

A Projection for the Revaluation of Unfair Competition

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"The world is still deceiv'd with ornament.
In law, what plea so tainted and corrupt
But, being seasoned with a gracious voice
Obscures the show of evil? In religion,
What damned error but some sober brow
Will bless it and approve it with a text,
Hiding the grossness with fair ornament?
There is no vice so simple but assumes
Some mark of virtue on its outward parts."
Shakespeare, *The Merchant of Venice*,
Act III, Sc. II.

INTRODUCTION

The rubric of unfair competition is peculiarly American in its origin and application.¹ While the term has not been used generally by the English courts they have applied its principles under the heading of "passing off."² The American concept of unfair competition originates from the cases which relate to the appropriation of trade-marks and trade-names.³ In its early form, the common law doctrine of unfair competition was limited to "passing off" cases, the practice of diverting business by falsely representing the articles being sold as being those of a competitor.⁴

Unfair competition is an elusive term and does not lend itself

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¹ POLLOCK, *LAW OF TORTS* 248 (14th ed. 1939).

² Pollock notes the absence of the term but not of the concept in English law. POLLOCK, *ibid.* But cf. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490, 493 (W. D. Pa. 1938) in which the court opines that "the doctrine of unfair competition is not recognized under the English Common Law."

³ See Handler, *Unfair Competition*, 21 *IA. L. REV.* 175, 182 (1936). For other articles on the historical development of unfair competition see Chafee, *Unfair Competition*, 53 *HARV. L. REV.* 1289 (1940); Haines, *Efforts to Define Unfair Competition*, 29 *YALE L. J.* 1 (1919); Jones, *Historical Development of the Law of Business Competition*, 36 *YALE L. J.* 42, 207, 351 (1926-1927). See also 1 NIMS, *THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS* Ch. 1 (4th ed. 1947); DERENBERG, *TRADE-MARK PROTECTION AND UNFAIR TRADING* 39ff., 79ff. (1936); 1 CALLMANN, *THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS* Ch. 2 (2d ed. 1950); HOPKINS, *THE LAW OF TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION* 40a (4th ed. 1924).

⁴ OPPENHEIM, *UNFAIR TRADE PRACTICES* 44 (1950).

easily to definition, for, as Professor Handler has observed, the phrase "embodies a conclusion rather than the means of determining the legality of business behavior."⁵ The conflicting and diffusive economic philosophies of businessmen, of judges and of legislators have added to the difficulty of marking out a plane of competition consonant with qualitative competitive standards.

The elasticity of business morality in the drive for trade has also had a retarding effect upon the development of superior rivalry standards. Thus, the precepts formulated by the courts reflect the various business codes and philosophies, for no unfair or excessive commercial practice could survive without the support of the majority of the men active in a trade. This is almost an aphorism since "the men engaged in business make the rules of the game, legislatures and courts to the contrary notwithstanding."⁶

Early direction for the formulation of legal sanctions was given by Economist Henry Carter Adams when in 1887 he developed the concept of a legal plane of competition. Adams maintained that when the majority of competitors were in accord as to a business procedure and a minority of their group refused to abide by the practice, the law should give support and sanction to the majority. Thus, he contended, a legal plane of competition, higher than can be developed in the absence of legal force, would evolve.⁷

In this manner the courts expanded the concept of unfair competition to narrow the gap between the law and the public conscience. However, the courts have not followed any rigid or inflexible doctrines as to when they should interfere to prevent unfair business methods. Each case is considered in the light of its particular facts,⁸ the courts being guided in each instance by what has been called "the principles of old-fashioned honesty."⁹ Quite naturally, such vague, general notions bred disparities, inconsistencies and conflicts in the law, a weakness not denied by the courts.¹⁰ Yet, any other approach,

⁵ Handler, *op. cit.* note 3, at 175.

⁶ Williams, *The Federal Trade Commission Law*, 63 ANNALS 3 (1916).

Mr. Justice Douglas recently gave further implementation to this thought when he said: "Law provides many sanctions against conduct which society condemns. But law is not and never can be the repository of our entire moral code. It deals only with the more extreme and more severe instances of immorality." Douglas, *Honesty in Government*, 4 OKLA. L. REV. 279, 280 (1951).

⁷ Adams, *Relation of the State to Industrial Action*, 1 PUBLICATIONS OF THE AMERICAN ECON. ASSN. No. 6, 43-44, 46-47 (1887), as cited by Oppenheim, *op. cit.* note 4, at 2.

⁸ *Jewel Tea Co. v. Kraus*, 187 F. 2d 278, 282, 88 U.S.P.Q. 14, 16 (7th Cir. 1950).

⁹ *Ibid.*

¹⁰ *Id.* at 15. In *Premier-Pabst Corp. v. Elm City Brewing Co.*, 9 F. Supp. 754, 760, 23 U.S.P.Q. 84, 89 (D. Conn. 1934) this criticism was expressed as follows: "It has been stated by eminent authority that in cases of unfair competition, such conduct is wrongful as 'shocks the judicial sensibilities.' This, however, is observation upon

it was feared, would have produced a rigid, mechanical jurisprudence which might have had a seriously deterring effect upon American commercial activity and our economic progress.

Nevertheless, in the numerous court decisions rendered during the past two hundred years which affect American business practices, certain general principles have been formulated. These concepts, a few of which are summarized below, embody the various philosophies for preventing trade abuses.

The underlying, early doctrine, that it is wrong for a businessman fraudulently to sell his goods as and for those of a competitor, was applied in cases involving misrepresentation by word ("passing off") or by conduct (wrongful appropriation of trade-marks).¹¹ This doctrine has been extended to the copying of labels, packages, color, wrappers, dress, form and appearance of goods. Therefore, "unfair competition in trade is not confined to the imitation of a trade-mark, but takes as many forms as the ingenuity of man can devise."¹²

Inevitably, the courts were compelled to extend the doctrine to include other competitive practices which were designed to injure a rival's business. As one court clearly summarized the problem, "... in the march of commerce, skulduggery seems to have kept abreast of science in inventiveness, so that new and more subtle means were found to violate the right of identity by introducing confusion into the public mind; much as sly innuendoes were substituted for cruder words wherewith to sap and destroy reputations. On the whole these subtleties have found small favor with the courts. . . ."¹³

The unfair methods were extended to include interference with contractual relations; disparagement of product, title and business practices of another; the use of illegal methods to attract customers; intimidation, coercion and molestation of competitor's customers; and the appropriation of values created by another.¹⁴

Excerpt.

THE OBJECTIVES OF THE LAW OF UNFAIR COMPETITION

The legal foundation of unfair competition is judicial in origin. The courts have developed the concept within the frame-work of equity to prevent enrichment at the expense of what another has created.¹⁵

the law, and not a statement of the law itself. For the law is said to be a rule of human conduct, and surely the honest but perplexed man of business (like the *nisi prius* judge) can derive little practical guidance from such an observation."

¹¹ Premier-Pabst Corp. v. Elm City Brewing Co., *ibid.*

¹² Manitowoc Malting Co. v. Milwaukee Malting Co., 119 Wisc. 543, 546, 97 N.W. 389, 390 (1903).

¹³ Premier-Pabst Corp. v. Elm City Brewing Co., *op. cit.* note 10, at 759.

¹⁴ The articles and treatises listed in note 3 document these propositions.

¹⁵ Sunbeam Corp. v. Sunbeam Furniture Co., 88 F. Supp. 852, 85 U.S.P.Q. 58 (S. D. Cal. 1950).

However, there is no universally accepted rationale to form the basis for the relief provided by the law. Its objectives, which have been separately and collectively recognized by the courts, are threefold.¹⁶ It seeks (1) to protect the honest businessman in the trade to which he is fairly entitled;¹⁷ (2) to punish the dishonest trader who attempts to take away his competitor's business by unfair means;¹⁸ and (3) to protect the public from deception and unfair business practices.¹⁹

Professor Handler has carefully noted that jurists are in disagreement as to the basis for this relief.²⁰ Some courts have theorized that its objective is the protection of property — custom or good-will. Others have supported the view that the economic well-being of consumers is the ultimate goal of commercial activity.²¹ The courts give only passing reference to the punishment theory.

Judge Frank has observed that the bases of the judicial acceptance of these concepts reflect, in a measure, the economic theories of the times.²² It would seem that intervention in unfair competition cases was first allowed to eliminate the adverse effect of unfair business practices on competitors. In the initial application of the doctrine of unfair competition, little attention was given to the interests of the consumers.

The appropriation of trade-names developed into a fairly common type of unfair competition with almost complete attention given by the courts to competitors' injuries. With the judicial interest focused upon the plight of the tradesman, it became increasingly apparent that the adverse effect of these business activities on the consumer was being neglected. Therefore, "before long the neglect of the consumer in trade-name cases aroused the judicial conscience."²³

Judicial awareness of the problem was observed in decisions,

¹⁶ *Smith, Kline and French Laboratories v. Clark and Clark*, 62 F. Supp. 971, 66 U.S.P.Q. 440 (D.N.J. 1945); *Mark Realty Corp. v. Major Amusement Co.*, 180 App. Div. 549, 168 N.Y. Supp. 244 (1917).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Stahly, Inc. v. M. H. Jacobs Co., Inc.*, 183 F. 2d 914, 86 U.S.P.Q. 131 (7th Cir. 1950); *K. Taylor Distilling Co. v. Food Center of St. Louis, Inc.*, 31 F. Supp. 460, 45 U.S.P.Q. 120 (E.D. Mo. 1940); *Standard Brands v. Smidler*, 171 F. 2d 34 (2d Cir. 1945).

²⁰ *Handler, op. cit.* note 3, at 183.

²¹ *Standard Brands v. Smidler, supra* note 19.

²² *Ibid.*

²³ *Id.* at 40. Judge Frank illustrates the point by reference to Adam Smith's opposition to the "mercantile system." Smith argued that the "mercantile system" constantly sacrificed consumer interest to that of the producer; thus, under this program the ultimate objective of commercial activity was production. Smith disapproved of the system, holding that consumption was the ultimate end and objective of production; therefore, producer interest was significant only as a necessary means to give support to consumer requirements.

which, as apparent after-thoughts, declared that the object of injunctive relief was to protect the purchasers from deception. The deception was deemed to be economically injurious to the customers. Judge Frank has stated that "for years the courts, when granting such protection, justified their decisions on the ostensible but unverified ground that the customers were being guarded against financial harm."²⁴ If the buyers had sued, Frank contended, the courts unquestionably would have required that they prove the economic loss since in an action for deceit a financial loss must be shown.

While it is correct that an action at law cannot be maintained for fraud unless accompanied by damage,²⁵ this principle is not necessarily applicable in equity. To illustrate, in order to defeat a suit for specific performance of a contract to convey land, upon the ground of fraud, the misrepresentation need not result in damage either to the vendor or third persons. Thus, equity will not enforce a contract regardless of damage if the misrepresentation was intentional, was made to deceive the vendor and the vendor relying upon misrepresentation was deceived by it.²⁶

This principle was followed where *A* obtained by fraud a contract from *B* to convey land on which *C* had required rights by working and making improvements. The injury to the third person was deemed sufficient to bar specific performance of the contract.²⁷

These circumstances are comparable to trade-name situations where injunctive relief is founded upon consumer deception. In neither case does equity require proof of damages to a third person as an essential element before it will intervene.

While Judge Frank's conclusions as to proof of damages may be questioned, his criticism of the judicial rule that relief is granted in trade-name cases solely upon the ground that customers are being protected from financial harm has substantial merit. To illustrate his point, Judge Frank describes a situation where the trade-name of a soap is imitated. The soaps are identical but the imitator sells his product at a lower price. If the sole object were to protect the public from economic harm, the imitator would then have a complete defense upon a showing that he sold his identical soap at a lower price. Wherein, therefore, is there a financial loss which will support the action?

The quarrel here is not with the result — that the imitator should be prohibited from deceiving the public — but with the rationale of the courts — that the imitator should be enjoined because of the financial harm caused consumers.

If the courts limited the objectives in the trade-name cases to the

²⁴ *Ibid.*

²⁵ *Morrison v. Lods*, 39 Cal. 381 (1870).

²⁶ *Kelly v. Central Pacific R. Co.*, 74 Cal. 557, 16 Pac. 386 (1888).

²⁷ *Ibid.*

general proposition that injunctive relief should be granted to protect the public from deception, their position would be supportable. But they are not content to stop here. It appears that in the early development of the doctrine imitators, in some instances, incidentally produced inferior products with resulting financial loss to the public. In those cases, the courts modified the rule to state that the second user should not be permitted to deceive the public because of the resulting financial harm to them. There, deception of the public was not permitted to stand independently as a basis for relief. The former proposition then in all likelihood was taken over by the courts to cover all trade-name cases irrespective of the circumstances creating financial harm to the consumer. Hence, the principle was repeatedly invoked by the courts without identifying and verifying the economic loss. The result has been that both rules, as applied by the courts, have been given the same meaning.

Judge Frank's criticism, it appears, would have more force if it were argued that while in equity deception of the public is a ground for interference in trade-name cases, the courts should not encumber the rule by unsupported verbal surplusage as to financial harm to the public since situations occur where the rule is applied when economic harm is non-existent.

For the most part, however, judicial action is based upon the concurrent considerations of injury to a competitor and probable deception of the public.²⁸ But this dual concept is of little practical significance since, in each case, relief is granted by applying the doctrine of secondary meaning.

Where a businessman passes off his goods or services as those of a complainant by imitating a trade-name, a term or the physical features first used by the complainant in association with his article, services or business, injunctive aid is contingent upon proving that the copied name, term or features acquired a secondary meaning. Secondary meaning is the association of the name, term or features of the article in the public's mind with the first comer as the source of the product in such a manner that the acts of imitation by the second comer in all likelihood creates confusion as to its source.²⁹

In secondary meaning cases, deception of the public is an essential factor for the granting of relief. It is of little consequence, therefore, that the protection of the competitor principle be affirmatively stated since it is implicit in the deception theory. However, it is conceivable that one might give different interpretations to the phrases "confusion of the public" in secondary meaning cases and "deception of the

²⁸ Handler, *op. cit.* note 3, at 183.

²⁹ American Fork and Hoe Co. v. Stampit Corp., 125 F. 2d 472 (6th Cir. 1942); Nu Enamel Corp. v. Nate-Enamel Co., 151 Misc. 405, 271 N.Y. Supp. 656 (N.Y. Sup. Ct. 1934); Sinko v. Snow-Craggs Corp., 105 F. 2d 450 (7th Cir. 1939).

public" when used broadly, but such distinction has not been made by the courts nor does it appear significant.

The conflicting explanations as to the effects of unfair trade practices on competitive activities illustrate further this lack of court agreement. Some courts have stated that the purpose of the law is not only to further competition but to destroy monopoly.³⁰ Others have taken the narrower view that it aims to foster competition, avoiding any affirmative claim as to its effect on monopoly.³¹ The third view is that the legal protection afforded by unfair competition doctrines, such as in trade-name cases, does not further competition; in fact, it is restrictive in its effect, resulting in lawful monopolies.³²

However, all are in agreement with the fundamental principle that competition in trade is universal, entirely proper and in the public interest. Therefore, a businessman has the right to enter an established field no matter what its effect on competitors.³³ As Mr.

³⁰ *Western Auto Supply Co. v. Knox*, 33 U.S.P.Q. 65 (W.D. Okla. 1937), reversed in 93 F. 2d 850, 36 U.S.P.Q. 168 (10th Cir. 1937).

³¹ *Baltimore Bedding Corp. v. Moses*, 182 Md. 229, 34 A. 2d 338, 59 U.S.P.Q. 405 (Md. C.A. 1943).

³² This view is very effectively presented by Judge Frank in *Eastern Wine Corp. v. Winslow-Warren, Ltd., Inc.*, 137 F. 2d 955, 957, 57 U.S.P.Q. 433, 435 (2d Cir. 1943) and in *Standard Brands v. Smidler*, *op. cit.* note 19, at 42.

³³ In *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932), the United States Supreme Court held an Oklahoma statute to be repugnant to the due process clause of the Fourteenth Amendment to the Constitution. The Act declared the manufacture, sale and distribution of ice to be a public business and forbade anyone from engaging in it without first procuring a license from a state commission. The statute also provided that no license was to issue without proof of necessity for the manufacture, sale or distribution of ice in the area to which the application applied and if the facilities already existing and licensed at that place were sufficient to meet the public requirements thereto, the commission could deny the application. This state experiment, initiated during an economic depression, restricted the right to engage in a lawful private business and was held to be a denial of due process. Mr. Justice Sutherland, in the opinion of the Court, stated that nothing was *more clearly settled* than the proposition (quoting from *Burns Baking Co. v. Byran*, 264 U.S. 504, 513 (1924)) that it is beyond the power of the state "under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." From Mr. Justice Brandeis' dissent in the *New State Ice Co.* case one reaches the conclusion that perhaps the principle is not as *clearly settled* as Mr. Justice Sutherland believed. Mr. Justice Brandeis cautioned the Supreme Court that while it had the power to strike down the experimental statute, the Court should constantly be on its guard lest it crystallize its prejudices into legal principles. So he stated, "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." Should we again be fraught with serious economic problems, it is not *clearly settled* what the Court would do if confronted by further state "experimentation." See Mr. Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905), in which he contended that "... a constitution is not

Justice Holmes clearly demonstrated, "a man has the right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already."³⁴ This principle of free competition remains undisturbed notwithstanding the temporal injury or the damage of interference with the *deserving widow's* business "when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade."³⁵

Nor will the courts enjoin the use of business methods which another has conceived and found profitable. To hold otherwise would result in the fostering of monopolies and the stifling of competition.³⁶ Also, the sharing of the good will of an article created by the ingenuity and judgment of another businessman, the demand for which has been effectively supplied by extensive and consistent advertising, is not, of itself, unfair.³⁷

This thesis was clearly expressed by Judge Yankwich when he stated that "under the guise of unfair competition, we should not grant to a person a *perpetual* monopoly which, for lack of invention, he is denied under patent law for a limited time. (The principle applies equally to trade-mark matters — Ed.) Unless the imitation is of structure, form, material and the like, and is so slavish as to tend inevitably to deceive the buyer . . . we should not allow . . . [it] to become a monopoly."³⁸

Economist Henry Carter Adams was of the opinion that the law of unfair competition does not curtail competitive action, being merely a determination of the manner in which it may lawfully take place.³⁹ This appears to be the more supportable position since this doctrine does not prohibit one from engaging in legitimate private business activity. The choice of and participation in a business venture is not subject to legal control. Restraint relates to the conduct or procedure

intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

³⁴ Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).

³⁵ *Vegeahn v. Guntner*, 167 Mass. 92, 106, 44 N.E. 1077, 1081 (1896).

³⁶ *Kaiser & Blair, Inc. v. Merchants Assn., Inc.*, 64 F. 2d 575, 576, 17 U.S.P.Q. 357, 359 (6th Cir. 1933).

³⁷ *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Coca-Cola Co. v. Nehi Corp.*, 36 A. 2d 156, 60 U.S.P.Q. 345 (Dela. Sup. Ct. 1944).

³⁸ *Joyce, Inc. v. Fern Shoe Co.*, 32 F. Supp. 401, 405, 45 U.S.P.Q. 243, 247 (S.D. Cal. 1940).

³⁹ Adams, *Relation of the State to Industrial Action*, 1 PUB. OF THE AM. ECON. ASSN. 43 (No. 6, 1887).

of doing business. The objective is not to restrict quantitatively or competitively those who may engage in a business pursuit but to restrain all comers from such business conduct as is deemed to be unfair.

Since some business activities are based solely on the imitation of financially successful and accepted trade-names and products, prohibitions as to the copying of established names or significant commodity features frequently result in a reduction in the number of participants in business ventures. Whether such limited restrictions constitute legal monopolistic practices depends essentially on the meaning given to the word "monopoly." Differences of opinion exist as to whether proscription of these unfair trade practices is "monopolistic" in character. However, it is not the purpose here to dwell at length on a related problem in semantics. More significant, for present consideration, are the differences of opinion which exist regarding the meaning and objectives of unfair trade practices. These conflicts and distinctions, as they relate both to the extension of doctrines and to the application of established principles, reveal the need for a thorough revaluation of the basic concepts of trade practices and refinement of judicial case treatment.⁴⁰

THEORIES OF LIABILITY — NOMINATE AND PRIMA FACIE TORTS

Differences exist not only within the frame-work of unfair competition but also as between the theories of tort liability. The two basic theories of liability are: (1) The nominate torts and (2) the prima facie torts, the former being the more generally accepted doctrine.⁴¹

The nominate torts theory holds that all actionable wrongs must be brought under a specific tort which is judicially recognizable, such as negligence, deceit, malicious prosecution, etc. While under the early common law there was no tort called "unfair competition," certain unfair trade practices were categorized under other recognized torts. Eventually, these practices, developing from the conventional

⁴⁰ More than ten years ago Professor Chafee expressed the opinion that the time was "ripe to extend unfair competition over all it popularly means, namely, every unfairness by a competitor." Chafee, *op. cit.* note 3, at 1302.

Judge Frank, while not offering a theory of liability for unfair trade practices, suggested "that the judge-made trade name doctrines . . . be re-evaluated in the light of competent research showing their practical social consequences on consumers, and that, until then, the courts should not extend those doctrines to foster expanded trade-name monopolies." *General Time Instrument Corp. v. United States Time Corp.*, 165 F. 2d 853, 855 (2d Cir. 1948).

⁴¹ Professor Oppenheim in his *UNFAIR TRADE PRACTICES* Ch. 1 (1950) gives an excellent account of the various theories of tort liability. In summarizing these theories the writer leaned heavily upon Professor Oppenheim's survey.

torts, took on individual characteristics.⁴²

The prima facie tort theory has received much attention in America since its introduction by Holmes and Wigmore.⁴³ The essence of the doctrine is given in a series of questions by Professor Oppenheim: (1) Has a legal harm been suffered by the plaintiff? (2) Was the defendant responsible for the harm? and (3) Can the harm be justified? Is it privileged?⁴⁴

Mr. Justice Holmes, in the famous decision of *Aikens v. Wisconsin*,⁴⁵ defined the principle in the oft-quoted statement:

"It has been considered that, prima facie, the intentional infliction of temporal damages is a cause of action, which as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."

The prima facie tort theory operates from the basic premise that all intentional, unjustifiable harm to business is tortious; thus, under

⁴² Sir John Salmond was a leading advocate of the nominate torts doctrine. He opined that there was no English law of *tort*, only on English law of *torts*, "that is, a list of acts and omissions which, in certain conditions, were actionable." SALMOND, *LAW OF TORTS* 15 (10th ed. 1945). Salmond contended, therefore, that a plaintiff must bring his cause of action under a recognized tort. Professor Winfield did not agree with this view. He argued that novelty itself is not a conclusive objection to a cause of action, admitting, however, that the novelty of the suit may raise a presumption against it. Winfield, *The Foundation of Liability in Tort*, 27 COL. L. REV. 1 (1927). Sir Frederick Pollock held an opinion contrary to Salmond's, supporting the prima facie torts theory. Hence, his view of the law of torts extended beyond the range of a number of recognized, rigid rules. See Pollock, *Preface . . . in THE LAW OF TORTS VI* (1887), in which he stated " . . . the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts — that this is a true living branch of the Common Law, not a collection of heterogeneous instances." Note the different meanings Salmond and Pollock gave to the word "torts."

⁴³ Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894); Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894).

This theory has its origin in early English court dicta. As early as 1760, Lord Mansfield referred to "the action upon the case" (the forerunner of several modern torts) as a "liberal action." *Gardiner v. Croasdale*, 2 Burr. 905, 906; *Moses v. Macferlan*, 2 Burr. 1005, 1011-1012. Chief Justice Pratt in 1762 said, "Torts are infinitely various, not limited or confined." *Chapman v. Pickersgill*, 2 Wils. 145, 146. See the discussion in WINFIELD, *THE LAW OF TORTS* 14 (3d ed. 1946). Deeper doctrinal roots were planted in the English cases of *Keeble v. Hickeringill*, 11 East 574 note (Tr. 5 Ann.). The House of Lords *Trilogy* (*Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.*, 23 Q.B.D. 589 (1889), *affirmed* (1892) A.C. 25; *Allen v. Flood* (1898) A.C. 1; and *Quinn v. Leatham* (1901) A.C. 495); and *Templeton v. Russell* (1893) 1 Q.B. 715. Lord Justice Bowen in *Skinner & Co. v. Shew & Co.* (1893) 1 Ch. 413, 422, gave recognition to the doctrine. He said, "At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally and without just cause or excuse."

⁴⁴ Oppenheim, *op. cit.* note 4, at 47.

⁴⁵ 195 U.S. 194, 204 (1904).

this doctrine, additional torts may be formulated by the courts to meet new conditions in a changing competitive society. The central issue, in each case, is the nature and scope of the justified or privileged conduct.

While this doctrine has not been followed by the majority of the American courts, its influence has recently spread to include the New York Court of Appeals.⁴⁶ The majority, however, provide relief against unfair business practices by reliance upon the nominate torts, the conduct being condemned under various names.

However, in their consideration of trade activities, the American courts have not adhered strictly to the orthodox nominate torts. As Professor Oppenheim observed, "In thus building up a list of recognized business wrongs, the courts have actually extended the area of relief against unfair trade practices without necessarily so denominating them. The least that can be said is that under the modern common law the American courts manifested a restlessness in being hemmed in by the walls of the nominate torts and began to build a bridge from the specific torts to the broader outlook of the *prima facie* theory. The fact that the courts in this country did not occupy the whole area on the other side of the bridge does not nullify the significance of the connecting link."⁴⁷

In going beyond the orthodox nominate tort rules to extend the bases for relief in trade practice cases, the courts have applied principles which are difficult to delineate and identify. The shibboleth of nominate commercial torts has undergone considerable change by the judicial extension and modification of the definitions and meanings of old terms and doctrines.⁴⁸ To meet the changing therapeutic needs

⁴⁶ *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E. 2d 401 (1946) invoked the *prima facie* tort theory. In that case a publisher of musical compositions complained that the defendant in a weekly radio "hit song" program presented the nine or ten most popular songs of the week which were selected with caprice, did not reflect an accurate survey of the national or relative order of popularity of the songs and were made with intent to injure the plaintiff in the sale of its songs.

⁴⁷ Oppenheim, *op. cit.* note 4, at 48.

Professor Winfield in the earlier period of his career supported the *prima facie* tort theory but later changed his position, contending that the nominate tort doctrine is "suffice" although the other concept is "valid." His change of mind was founded on the creation by the courts of new nominate torts. He saw in these new rules the acceptance and extension of the principle that all unjustifiable harm is tortious. He, therefore, concluded that tort law is "steadily expanding and . . . [that] the idea of its being cribbed, cabined and confined in a set of pigeonholes is untenable." WINFIELD, *THE LAW OF TORT* 15 (3d ed. 1946).

⁴⁸ Dean Pound has described law as " . . . a highly complex aggregate, arising social from the attempt of men in politically organized society to satisfy the claims involved in civilized social life so far as they may be satisfied by a systematic ordering of conduct and adjustment of relations. Looking at law this way we

of an active, aggressive economy without revealing changes in the social prescriptions, the containers bearing the old labels were filled with new elixirs by the judicial pharmacists. The failure to identify the new compounds by different names has created doctrinal confusion and uncertainties. This reflects, in a measure, the not uncommon current practice of compounding judicial prescriptions intuitively where the results substantially depend upon the economic predilections and subjective evaluations of the jural pharmacists.

Abstract verbalism in relation to unfair trade practices has been fraught with overlappings and inconsistencies. This is not novel in the law, for the resulting conflicts inevitably arise in the absence of clear systematization and uniform classification. It does not follow, however, that disingenuous formulation of general principles will secure a pattern of uniformity and consistency in the law. As some students have observed, the administration of justice is not controlled by general principles.⁴⁹ In fact, legal history has taught us "that rules and principles are empty symbols which take on significance only to the extent they are informed with the social and professional traditions of a particular time and place. . . . It is not the symbols but the habits of thought that control interpretation and decision."⁵⁰

In this connection, the judicial process followed in formulating and rendering decisions has special significance.⁵¹ Dean Pound has directed attention to the "intuitive" process used by the courts in applying abstract concepts to the facts in specific cases. Where standards are applied intuitively by the courts when varying circumstances must be kept in mind, Dean Pound concludes that there must be reliance upon "the trained common sense of the expert as to uncommon things."⁵² Such common sense cannot be formalized into a syllogistic

perceive at once how change takes place continually without our being aware of it Because names and forms remain the same it does not follow that the content of the law is constant. Modification of the current ideal picture of the social order by which judges are governed in choosing analogies, in developing principles, and in applying rules, may change the law in action profoundly within a generation while the outward forms remain the same." Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 660 (1923).

⁴⁹ Yntema, *The Hornbook Method and the Conflict of Laws*, 37 HARV. L. REV. 468, 479-480 (1928); FRANK, *LAW AND THE MODERN MIND* 157 (1930).

⁵⁰ Yntema, *ibid.*

⁵¹ Examples of such writings are: CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949); FRANK, *Cardozo and the Upper Court Myth*, 13 LAW AND CONTEMP. PROB. 369 (1948); FRANK, *LAW AND THE MODERN MIND* (1930); FRANK, *COURTS ON TRIAL* (1949); COHEN, F. S., *Transcendental Nonsense and the Functional Approach*, 35 COL. L. REV. 809 (1935); HUTCHISON, *Judgement Intuitive — Function of the "Hunch" in Judicial Decisions*, 14 CORN. L. Q. 274 (1929); LLEWELLYN, *A Realistic Jurisprudence — The Next Step*, 30 COL. L. REV. 431 (1930); COHEN, M. R., *LAW AND THE SOCIAL ORDER* (1933).

⁵² Pound, *The Theory of Judicial Decision III*, 36 HARV. L. REV. 940, 952 (1923).

premise. "Where the call is for individuality in the product of the legal mill . . . we resort to standards and to intuitive application." He thinks, however, that resulting uncertainties are more theoretical than actual, since the instinct of the trained person functions with assurance. "Innumerable details and minute discriminations have entered into it and it has been gained by long experience which has made the proper inclusions and exclusions by trial and error until the effective line of action has become a habit."

Yet, any survey of the law of unfair competition creates a doubt as to the correctness of this conclusion, since inconsistencies and indefiniteness are not uncommon findings, revealing a wider range for vagaries in the operation of the intuitive process than is admitted or recognized.

Professor Yntema is of the opinion that a decision is reached by a judge "after an emotive experience in which principles and logic play a secondary role. The function of juristic logic and the principles which it employs seems to be like that of language, to describe the event which has already transpired."⁵³ General principles are incapable of controlling decisional results. Indefinite as to meaning, they are suggestive of individual interpretations founded upon subjective experience. And because of this indefiniteness they offer little directional guidance in the organization of that experience or in correlating it to other experiences and conditions.

Applying Professor Yntema's theory to the law of unfair competition, the significant issue, since the law is general in substance, is not the formulation of the principle but the determination of the cases and the extent to which it is applicable. Professor Yntema reasoned that the general principle cannot control "because it does not inform."⁵⁴ What is needed, however, is not blind devotion to the facts in trade cases, but a reconsideration of their principles to give the concepts more meaning and definiteness. Otherwise, the law becomes a game with the results hinging, to a substantial extent, on the skills and adroitness of the attorneys rather than on principles of justice.

Another basis for the difficulty in exploring the judicial process is in the determination of the facts which the judge considers controlling in a case.⁵⁵ When the facts are few in number, the salient factors can be easily ascertained. The problem of identification of the controlling facts develops, however, when the factors are numerous and diversified and it is uncertain which were considered pertinent by the judge in his deliberation. Since those factors are so significant in unfair competition holdings, each case may assume features of varying distinctiveness so that the relationship between similar situations be-

⁵³ Yntema, *op. cit.* note 49, at 480.

⁵⁴ *Ibid.*

⁵⁵ FRANK, *LAW AND THE MODERN MIND* 151 (1930).

comes uncertain and speculative. Therefore, the application of a general principle to complex, though similar circumstances, may result in varying conclusions, offering little by way of predictability or certainty of the law.

OTHER THEORIES OF LIABILITY

Other theories of liability, which enlarge upon the restrictive nominate tort principles, have been developed by legal writers.⁵⁶ While the scope of the protection of honest trade activity is broadened by them, narrowing the gap between legal and moral principles, none as yet has been given judicial endorsement. Nevertheless, any discussion of the theories of liability would be incomplete in the absence of a treatment of these serious and significant contributions.

Professor Grismore called for a recognition that a time is reached in the competitive business struggle, short of acquiring the trade, when the competitors gain a right to it so that the other traders should not be permitted by continuing the quest for that business to invade the right, except when the conduct is privileged as being fair competition.⁵⁷ He showed dissatisfaction with the American courts, unwillingness to adopt the *prima facie* tort theory's wider range of business protection and argued that in the absence of such policy our commercial life will be a mad scramble. He claimed, further, that the point of interference is reached when it seems that a customer would engage in business with the plaintiff were it not for the activity of the plaintiff's competitor in attracting the trade away from the plaintiff. Thus, if a trader can show with reasonable certainty that his competitor's conduct was responsible for his loss of business, a cause of action exists, unless the competitor can justify his activity as being fair.

Professor Leon Green formalized a segment of tort law to include "hurts done to commercial relational interests by third persons."⁵⁸ He evolved a variegated classification of relational interests, extending them beyond symbolized, tangible objects to include intangible forces. He observed that injury to relational interests involve three parties: a plaintiff, a defendant and a third person. A relationship exists between the plaintiff and a third person which is harmed by the defendant. He conceives of this to be "a hurt done to a relational

⁵⁶ For a comprehensive summary of these additional theories, see Oppenheim, *op. cit.* note 4, at 59.

⁵⁷ Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor?* 33 MICH. L. REV. 321 (1935).

⁵⁸ Green, *Relational Interests*, 29 ILL. L. REV. 460, 1041 (1934-1935); 30 ILL. L. REV. 1 (1935).

interest." Such interests are classified by him as family, trade, professional, general social and political.

Professor Chafee classifies the diversified commercial activities into three categories: The policy of Conservatism, the policy of Conquest and the policy of Exploration. "Conservatism" covers the standard forms of "passing off." "Conquest" extends unfair competition to cover all unfair competitive practices. These extensions of the doctrine are represented in the prima facie tort theory, statutory control of competition and the inclusion of misappropriation as a segment of unfair competition.⁵⁹ Chafee concludes that the policy of "Conquest" has been restricted by court interpretation, offering no satisfactory solution to the many problems of unfair trade practices. He recommends, in lieu of either "Conservatism" or "Conquest," the application of his policy of "Exploration." This would permit a cautious extension of doctrinal concepts to include new types of standardized wrongs. In this manner, specific practices could be considered separately, omitting the wide range of the prima facie tort theory where a practice is presumed tortious unless justified. He cautions against the application of new principles to frequently recurring harms.

To follow a different policy, in Chafee's opinion, would eventually lead to the court's assuming the task of business management. Finally, he considers the following social factors which influence judicial determination of trade practice cases: (1) The protection should be definable; (2) monopolies are deemed to be against the public interest; (3) the practice is to centralize the protection of morality in the government; and (4) certain trade practices are controlled more effectively by administrative bodies than courts.⁶⁰

Rudolph Callman has developed a theory of unfair competition for American courts, founded on civil law doctrine, with the view to formulate basic concepts of general applicability. The judicial application of this concept would broaden the range of current case by case treatment. Essentially, Callmann views business competition as "A peculiar order of *struggle* as distinguished from an order of *peace*." Peace and harmony have been marked out for large areas of the law; however, in Callmann's opinion, competitive relationship is not among them, since it is the basis for the struggle and conflict between business rivals for trade. He claims that it is part of the order of struggle which permits a competitor to injure the trade of his rivals. He concludes that the law should regulate this struggle for business, defining fair competitive practices as "struggle according to game-like rules by means of constructive effort subject to the natural conditions of the market." Unfair competition would constitute the

⁵⁹ International News Service v. Associated Press, 248 U.S. 215 (1918).

⁶⁰ Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940).

violation of these rules, but the unfair practice would originate directly from the "struggle order" rather than as a by-product of a conventional tort concept of the "peace order." In this manner, Callmann's "struggle" theory provides a foundation for liability apart from the prima facie tort theory. Thus, instead of treating competition as a privilege or justification for competitive harm, the injury is regarded as prima facie in accord with the "order of struggle."⁶¹

In Professor Handler's opinion, the common law has provided protection against only extreme competitive excesses, leaving business exposed to a wide range of abuses which the courts could restrain. Therefore, he observes, the judicial control of unfair competition is deficient and haphazard.

He finds, also, that the statutory contribution to unfair competition is limited since many of the statutes are so general in language as to fail to establish a plane of competition. This responsibility is passed on to the courts and administrative agencies. It is his view that these short-comings could best be met by a uniform statute enacted by Congress and the states relating to common law trade practices and the significant functions condemned by the Federal Trade Commission and the pertinent legislative restrictions. This uniform act would contain the basic elements of a law of unfair competition with changes and additions provided by administrative legislation. He favors administrative regulation, covering segments of industrial activity, to the less effective case by case, decisional control. Handler concludes that "A careful legislative and administrative definition of unfair competition, plus the net-work of judicial and administrative sanctions and public and private remedies, would go far in elevating our business standards and in facilitating competition."⁶²

The Restatement of Torts, by giving independent consideration to specific unfair trade practices, avoids the sweeping effect of the prima facie tort theory. Professor Chafee considers the Restatement and his Exploration policy to be substantially the same since each allows for the gradual expansion of unfair competition to include new types of injuries. Professor Oppenheim, while in accord with Chafee's conception of the Restatement's methodology, takes issue with his views regarding the coverage of the Restatement. The inter-relation between the liability based upon nominate torts and the general principles of prima facie torts in the Restatement is demonstrated by reference to the Restatement commentary on Section 766. The restatement recognizes "a general duty not to interfere purposely with another's reasonable expectancies of trade with third persons, whether or not the expectancies are secured by contract, unless the interference

⁶¹ Callmann, *What is Unfair Competition?* 28 GEO. L. J. 585 (1940); 1 Callmann, *supra*, note 3.

⁶² Handler, *Unfair Competition*, *op. cit.* note 3, at 262.

is privileged under the circumstances." This section, Professor Oppenheim opines, follows the *prima facie* tort theory, the difference being as between situations which give rise to a justification or privilege.⁶³ The Restatement particularizes the types of injuries and does not accept, exclusive of nominate torts, the broad, general Holmes-Wigmore thesis that any competitive activity is *prima facie* tortious necessitating justification. However, there is merit to the contention that the Restatement provides an inter-relation of the liability founded upon nominate torts and the basic concept of *prima facie* torts.

CONCEPTUAL CONFLICTS

It is almost axiomatic to say that certain basic principles in unfair competition are uncontrolling because they are uninforming. While any attempt to reduce the fundamental concepts of unfair trade practices to mathematical certainty would be grasping the shadow for the substance, a revaluation of the principles to satisfy our social requirements would do much to reduce the uncertainty and confusion which currently characterizes the field. By eliminating any plan for absolute legal certainty "we may augment markedly the amount of actual legal certainty."⁶⁴ Yet, any study of our trade practices must invariably be subject to the imperfections of our knowledge of the social sciences, the limitation of normative knowledge and the variability of values in a continuously changing society.⁶⁵ But only by working in limited areas, such as trade practices, can we rechart a clearer social course, allowing for the correction of error and the constantly changing human requirements.⁶⁶

Some of the problems and confusion in unfair trade practices are traceable to the conflicting and inaccurate meanings given by the courts to terms and concepts. In any survey of legal principles the words used to give meaning to the concepts, as well as the propositions themselves, should be studied.

Authorities agree that words are merely the symbols of objects or abstractions.⁶⁷ Philbrick has demonstrated that words, like other

⁶³ Oppenheim, *op. cit.* note 4, at 67.

⁶⁴ Frank, *op. cit.* note 55 at 159.

⁶⁵ Stone, *The Myths of Planning and Laissez Faire*, 18 GEO. WASH. L. REV. 1, 45 (1949).

⁶⁶ *Ibid.* Professor Stone correctly asserts that social action must proceed piecemeal within fields, with allowances for mistake and adjustment to varying human needs.

⁶⁷ OGDEN AND RICHARDS, *THE MEANING OF MEANING* 9 (2d ed. 1927); PHILBRICK, *LANGUAGE AND THE LAW* 26 (1949); HAYAKAWA, *LANGUAGE IN THOUGHT AND ACTION* (1949).

To denote both objects and abstract ideas the semanticists use the word "referent."

symbols, do not maintain a constant relationship to the objects symbolized.⁶⁸ Ogden and Richards explain this indefiniteness of word-meaning by tracing the symbols back to their source. Symbols do not arise from the inherent nature of the objects but are created by man to communicate ideas. Between man and the object is a third factor, thought. The object stimulates a thought in the mind of the relator and describes it by an appellation, a word.⁶⁹ With different relators and settings, the words symbolizing the objects reflect the meanings given them. In like manner, abstract words have no fixed meanings, since they do not exist independent of the mind. The words express the thoughts of the relator in whose mind they are in association with other thoughts. The association process is different for each person, although the words may have connotations for individuals.

Furthermore, Ogden and Richards' examination of the word "meaning" reveals that there is no single course open which leads away from our verbal difficulties. In fact, there are many routes available with varying advantages and disadvantages. Illustrative of this confusion is the presence of sixteen reputable, yet different, definitions and nine subordinate usages of "meaning."⁷⁰

Words are imperfect media of communication. As Professor Chafee observed, "A word doesn't stay put. It wabbles and slides around."⁷¹ Confusion and obfuscation result when the same word denotes two ideas which are closely related. Therefore, Ogden and Richards formulate as an initial requirement of an adequate scheme of symbols the proposition that a symbol should stand for only one referant.⁷² But, unfortunately, this is an ideal, which in the present order of things, is unattainable. Yet, while we are aware of the imperfection of words as symbols, we should use them as best we can with utmost care and accuracy.

⁶⁸ Philbrick, *id.* at 26-27.

⁶⁹ See the versatile Chafee's *The Disorderly Conduct of Words*, 41 COL. L. REV. 381 (1941), for an absorbing discussion on the subject.

⁷⁰ Professor Chafee lists a few of these having legal application; "the words annexed to a word in the dictionary; what the user of the word intends to be understood from it by the listener or reader (intention of the testator, etc.); that to which the user of the word actually refers; that to which the user of the word ought to be referring, (this is common usage, the view held by Mr. Justice Holmes, who insists on 'the ordinary meaning of the language in the mouth of a normal speaker situated as the party using the language was situated') — *Violette v. Rice*, 173 Mass. 82, 53 N.E. 144 (1889); Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899); that to which the interpreter believes himself to be referring; that to which the interpreter of a word believes the user to be referring." Chafee, *id.* at 387.

⁷¹ *Ibid.*

⁷² The word "referant" is used here in its technical sense. See note 67 for its definition.

The point has also been made that, in the hierarchial⁷³ nature of words, "the more abstract the word, the greater the risk that any proposition in which it is used will not be true of all the persons and things within the class denoted by the word, and the more liable we are to forget that at bottom we are talking about persons and things."⁷⁴

While verbal abstractions are less subject to precise universal definitions, we should, nevertheless, risk the ascent to the higher hierarchial peaks. Continuously changing social conditions require the constant reappraisal of words to determine whether they satisfactorily identify and communicate legal concepts. Nor would the problem be answered if legal abstractions were eliminated in the absence of acceptable methods for scientific verification. Words are necessary media to express ideas and to denote variegated and related facts. It is very important, however, that we be constantly aware of the various meanings given legal terms in changing social environments. In this connection, our present need is for a big spring cleaning to see which terms in business practices embody effective and useful principles.⁷⁵

Attempts to regulate legal vocabulary, in the Hohfeldian or Wigmoreian manner, have met with little success. Yet, it is possible to identify the various uses of terms and "then to demand clear precision in indicating the meaning in any particular use. . . ." ⁷⁶ This should be our goal — to reevaluate unfair competitive terms and concepts in the light of social requirements.

A. *Fraud.*

The courts have followed three different concepts as to the requirement that fraudulent intent be present in unfair competition cases. One line of authority holds that fraudulent intent is an essential element of unfair competition.⁷⁷ Where there is an infringement of a technical trade-mark, the intention of the infringer is immaterial since fraud is presumed. However, this group holds that wrongful intent is essential for relief against unfair competition because the

⁷³ A Chafeeian symbol.

⁷⁴ Chafee, *op. cit.* note 69, at 390.

⁷⁵ *Id.* at 393.

⁷⁶ BINGHAM, *MY PHILOSOPHY OF LAW* 7, 12 (1941).

⁷⁷ Kellogg Toasted Corn Flake Co. v. Quaker Oats Co., 235 Fed. 657 (6th Cir. 1916); D. R. Lynn Shoe Co. v. Auburn Shoe Co., 100 Me. 461, 62 Atl. 499 (1905); Coca Cola Co. v. Loft, Inc. 19 Del. Ch. 292, 167 Atl. 900 (1935). See case notes 13 IND. L. J. 286 (1938) and 29 COL. L. REV. 44 (1929).

Also, fraud is the essence of a suit at law for damages resulting from unfair trade practices.

suit is founded upon the attempted deception of the public.⁷⁸ This principle applies to "passing off" or "secondary meaning" cases but is inapplicable to some of the more modern phases of unfair competition, such as the disparagement of the product of another. The salient element of unfair competition, under this narrow doctrine, is fraud, which is not presumed, and its existence must be established by a clear preponderance of the evidence.⁷⁹

The second theory is a more liberal doctrine. Under it an allegation of fraud is unnecessary in an unfair competition action. The "passing off" is what constitutes unfair competition and fraud is inferred from the inevitable consequences of the complained of act.⁸⁰ Therefore, it is not necessary, in an unfair competition suit under this doctrine, that actual fraud or wrongful intent be proved by direct evidence. This concept is founded upon the familiar principle that "a person is presumed to intend the ordinary results of his acts."⁸¹ Hence, it is not required to show that any person was actually deceived by the conduct and led to buy the goods of the second comer in the belief

⁷⁸ *American Specialty Co. v. Collis Co.*, 235 Fed. 929 (S.D. Ia. 1916).

⁷⁹ In *Hughes v. West Publishing Co.*, 225 Ill. App. 58, 66 (Chi. 1st Dist. 1922) the court said, "The essence of unfair competition is fraud. It consists in the sale of the goods of one vendor for those of another, and if the defendant so conducts its business as not to substitute its goods for those of complainant, the action fails." See also *Zangerle and Peterson Co. v. Venice Furniture Novelty Mfg. Co.*, 133 F. 2d 266, 56 U.S.P.Q. 351 (7th Cir. 1943).

⁸⁰ *Shredded Wheat Co. v. Humphrey Cornell Co.*, 244 Fed. 508 (D. Conn. 1917), *aff'd* 250 Fed. 960 (2d Cir. 1918); *Baker v. Master Printers Union of N. J.*, 34 F. Supp. 808, 47 U.S.P.Q. 69 (D. N. J. 1940); *National Nu Grape Co. v. Guest*, 69 F. Supp. 863, 73 U.S.P.Q. 184 (E. D. Okla. 1946); *Horlick's Malted Milk Corp. v. Horlick*, 40 F. Supp. 501, 51 U.S.P.Q. 269 (E. D. Wis. 1941).

⁸¹ *American Products Co. v. Ohio v. American Products Co. Michigan*, 42 F. 2d 488, 6 U.S.P.Q. 67 (E.D. Mich. 1930).

"... notwithstanding protestations and denials, a chancellor will not readily believe that one entering and operating in a competitive field did so in ignorance of the presence of competition. And if it once appears that the newcomer approached the field with knowledge of the existence of competition, under the familiar maxim that a man is deemed to intend the natural consequences of his acts, he is bound to know whether his own conduct will violate any established right of his predecessors in the field. To be sure, on occasions he may plausibly protest that the plaintiff's claim of an established identity is based, in part at least, on associations disseminated in the public mind so indirect and subtle that he was unaware of their existence or of their effect. But by and large, human psychology seems to be such that the public mind in so far as it depends for a particular identification upon indirect and subtle associations, is susceptible to confusion not through the blunt, forthwith acts of honest competition, but rather by kindred associations and suggestions similarly indirect and subtle. Consequently, when we find a newcomer in the field claiming to build for himself an identity depending upon subtle associations which in fact impinge upon those already established by the plaintiff, protestations of innocent intent overtax the credulity." *Premier-Pabst Corp. v. Elm City Brewing Co.*, *supra* note 10.

that they were those of the complainant. It is suffice to show that such deception is the natural and probable result of the action.⁸²

The third concept maintains that fraudulent intent is not necessary and that an unfair competitive practice may exist even if it is employed in good faith.⁸³ The basis for the application of this principle to "passing off" and "secondary meaning" cases is difficult to determine since the element of probable deception must be present in such suits and without it there can be no basis for relief. However, this doctrine can be invoked against other unfair competitive practices, including certain Federal Trade Commission prohibitions, where deception is not a determining factor for relief.

It is essential that the relationship between the unfair practice itself and the applicable theory for injunctive relief be carefully surveyed and identified. Those relational factors are sufficiently uniform in enough cases to provide the bases for a number of general norms. Such redefinition and integration should eliminate some of the vagaries and misapplications of theories to competitive situations.

B. *Functional Features.*

Functional features of unpatented or uncopyrighted articles may be freely copied by competitors. While this proposition can be simply stated, the determination of which features are functional frequently presents difficulties. The classification is further complicated by the various definitions given to those features. The significant definitions are:

1. Functional features are those which in an engineering sense, are essential to the construction of a commodity.⁸⁴ All other features are excluded under this definition.

2. Functional features are those which are commercially essential to the production of a marketable commodity.⁸⁵ This definition, while

⁸² *Hartzler v. Goshen Churn & Ladder Co.*, 55 Ind. App. 455, 104 N.E. 34 (1914).

⁸³ *Nesne v. Sundet*, 93 Minn. 299, 101 N.W. 490 (1904).

Federal Trade Commission findings as to false advertising follow this principle. In such cases, no question of fraud exists. In fact, the courts have ruled that such trade practices may be considered unfair even if they are employed in good faith. *Fairyfoot Products Co. v. Federal Trade Commission*, 80 F. 2d 684 (7th Cir. 1935); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Federal Trade Commission v. Balme*, 23 F. 2d 615 (2d Cir. 1928).

⁸⁴ *Lektro-Shave Corp. v. General Shaver Corp.*, 92 F. 2d 435 (2d Cir. 1937); *Motor Accessories Mfg. Co. v. Marshalltown Motor*, 167 Ia. 202, 149 N.W. 184 (1914). See also 3 Callmann, *op. cit.* note 3, at 1253 and 1266. "Functional features are those of a technical, not an ornamental nature."

⁸⁵ *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938), *rehearing denied*, 305 U.S. 674 (1938); *U. S. Electric Mfg. Corp. v. Bright Star Battery Co.*, 6 N.Y.S. 2d 690 (N.Y. Sup. Ct. 1938). See also Nims, *op. cit.* note 3, at 375.

including the above, enlarges the meaning of functional features.

3. Functional features are those which have attained consumer acceptance and are desirable to the buyer.⁸⁶

The process of judicial inclusion and exclusion of features, based on these widely differing definitions, have resulted in conflicting classifications of the same or similar features.

This confusion can be illustrated by reference to the design or style of articles. When goods are purchased largely for their aesthetic qualities, their features have been identified as functional by some courts. Such rulings are founded on the theory that the features contribute to the value and therefore "aid the performance of an object for which the goods are intended."⁸⁷ Hence, the contour of a bottle or container, because of its attractive design, may be functional, although the contents could be held equally as well in another receptacle. Under the first definition, however, the bottle or container would be classified as non-functional.

The general features of an electric lighting fixture have been classified as functional,⁸⁸ while the designs of an automobile lamp and horn were held to be non-functional.⁸⁹ Judge Learned Hand has criticized the latter classification, contending that the design of a motor lamp or horn may well be a factor in promoting the sale of the article.⁹⁰ When the mechanical operations of the article are the only elements which influence the buyer's choice, then, and then only, is the first definition conclusive. To deny the subsequent use of the design, in Judge Hand's opinion, is an unwarranted and unsound extension of the principle of unfair competition.

Judge Hand applied this same concept to fashion designs, which for various reasons are unprotected under the patent or copyright

⁸⁶ *Ainsworth v. Gill Glass & Fixture Co.*, 26 F. Supp. 183 (E.D. Pa. 1938), *aff'd.* in 106 F. 2d 491 (3d Cir. 1939); *Marvel Co., v. Pearl*, 133 Fed. 160 (2d Cir. 1904); *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. 2d 949 (8th Cir. 1941). See also 3 RESTATEMENT TORTS § 742. "A feature of goods is functional . . . if it affects their purpose, action or performance, or the facility or economy of processing, handling or using them; it is non-functional if it does not have any such effects." Also Comment: § 742a: "A feature is non-functional if when omitted, nothing of substantial value in the goods is lost. A feature which merely associates goods with a particular source may be, like a trade-mark or trade name, a substantial factor in increasing the marketability of the goods. But if that is the entire significance of the feature, it is non-functional; for its value then lies only in the demand for goods associated with a particular source rather than for goods of a particular design."

⁸⁷ Restatement, *supra*.

⁸⁸ *Ainsworth v. Gill Glass & Fixture Co.*, *supra*, note 86.

⁸⁹ *Rushmore v. Saxon*, 158 Fed. 499, 502 (C.C., S.D.N.Y. 1908); *Lovell-McConnell Mfg. Co. v. American Ever-Ready Co.*, 195 Fed. 931 (2d Cir. 1912).

⁹⁰ *Champion Spark Plug Co. v. A. R. Mosler & Co.*, 233 Fed. 112, 116 (D.C., S. D. N. Y. 1916).

acts. In the leading case, *Cheney Bros. v. Doris Silk Corp.*,⁹¹ the design on a tie was classified as functional and therefore could be copied. There the test of the functional feature was the attractive pattern, an important factor in the sale of the article.

Callmann attempts to distinguish between the automobile accessories cases and the *Cheney* decision.⁹² In his opinion, the ornamental accessories are not essential elements, while in the *Cheney* case, the design is the essential factor. He contends that the buyer interest is in the attractive design and not in satisfying the need for clothing. If the buyer is not attracted to the pattern, he will not purchase the article even if he knows that it is manufactured by a leading company. Callmann, therefore, concurs with the *Cheney* ruling but disagrees with Judge Hand's criticism of the accessories cases.

It would seem that the difference existing between the cases is one of degree and in no way affects the basic principle. Where the ornamental features of an article are a factor in its sale, under the third definition they are functional. This applies to the ornaments on the accessory items as well as to the pattern on the tie. Nor is the dress design the essential factor in the sale of the article. It is an essential item along with craftsmanship and the nature of the material. The average buyer looks for all three elements in an article.

But Callmann appears concerned that under this definition there is no protection against the slavishly minute simulation of goods. This, however, is another problem. The definitions of functional features reflect the basic philosophies regarding the control of commercial activity. They vary with the amount of competitive action permitted at the market place. The basic issue, what measures of control should be exercised over business, must first be resolved. Then a uniform definition of functional features will flow from it. As it is, the various economic philosophies of the judges find expression in the different and conflicting judicial views as to what are functional features.

The imitation of functional features may cause confusion as to the source when those features have acquired what the courts have mistakenly called "secondary meaning."⁹³ In such cases, the courts may require the second user to distinguish his product, but such confusion will not be the basis for an injunction against the use of

⁹¹ 35 F. 2d 279 (2d Cir. 1929). cert. denied in 281 U. S. 728 (1930).

⁹² 3 Callman *op. cit.* note 3, at 1266.

⁹³ The doctrine of secondary meaning is inapplicable where functional features are imitated. It applies only to non-functional features. Where there is confusion as to the source of functional features, the second user will not be enjoined from using them as in secondary meaning cases. The confusion may be eliminated by requiring the newcomer to add some nonessential arbitrary mark by way of distinction.

the functional features.⁹⁴ However, some courts have held firmly to the principle that they should not impose a burden, either by requiring a change in the appearance of the article or by adding unreasonably to the expense of its production and thus provide the first user with a significant advantage and substantially handicap his competitors.⁹⁵

On the other hand, it has been held that once the right of the second user to use the functional features is confirmed and if similarity between the goods creates confusion, the additional cost of production to distinguish the goods is immaterial. Under this theory, the manufacture is deemed a fraud and all elements of deception must be eliminated regardless of cost if production by the second user is to be allowed.⁹⁶ Here, again, the wide differences in basic concepts result in conflicting judicial action.

C. Comparison of Non-Functional Features.

The simulation of an article is "a reproduction which appears to be substantially the same as the original."⁹⁷ If the appearance of the whole object is substantially identical with the original, that is sufficient to constitute copying; thus, every detail of the article need not be reproduced. In fact, it is infrequent that the copy will be an exact duplicate of the original. The imitator invariably introduces enough difference to support a claim that there has been no imitation. These differences are incorporated with enough similarities so as to provide the general effect of the first article.⁹⁸

The courts use the sight test to determine whether the copying is sufficient to mislead the public. To determine whether there was simulation the courts observe the differences and resemblances of the articles. In this connection, three different tests have been applied.

⁹⁴ J. C. Penny Co. v. H. D. Lee Mercantile Co., *supra*, note 8; Champion Spark Plug Co. v. A. R. Mosler & Co., 233 Fed. 112 (S.D.N.Y. 1916); 1 Nims, *op. cit.*, note 3, at 371; 3 RESTATEMENT, *op. cit.* note 85, at § 741 (b) (ii); Shredded Wheat Co. v. Humphrey Cornell Co., *supra*, note 80.

⁹⁵ Shredded Wheat Co. v. Humphrey Cornell Co., *ibid.*

It is very difficult to establish unfair competition when the article is simply constructed with almost every feature being functional. See *McGhee v. LeSage & Co., Inc.*, 32 F. 2d 875 (9th Cir. 1929), where relief was not granted against the simulation of a drapery hook. In *A. C. Gilbert v. Shemitz*, 45 F. 2d 98 (2d Cir. 1930), the court held that the parts of a fruit juice extractor were so functional that a change in the model would not be justified except to avoid a clear case of confusion. See also case note in 13 IND. L. J. 286 (1938).

⁹⁶ This is the view of Judge Hough as summarized by Judge Learned Hand in *Shredded Wheat Co. v. Humphrey Cornell Co.*, *ibid.*

⁹⁷ 3 RESTATEMENT, *op. cit.* note 86, at § 741, Comment c.

⁹⁸ *Manitowoc Malting Co. v. Milwaukee Malting Co.*, *supra*, note 12.

One theory is that there is no simulation if the differences are more observable to the ordinary buyer than the resemblances.⁹⁹ The second test is that simulation is not determinable by detailed descriptions of the differences after careful comparison of the articles but rather by the resemblance between them.¹⁰⁰ The third procedure requires an examination of "the points of difference and resemblance as a whole and not merely the points of resemblance."¹⁰¹

Nor have there been any uniform or systematized principles formulated either as to the degree of care which must be exercised by the many buyers or the classification of the various articles purchased. Generally, "when the resemblance between the two articles is such that the ordinary buyer, under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates, is deceived, or might be deceived," the courts will grant relief.¹⁰² A resemblance which would deceive an expert or a very cautious buyer, quite understandably, is enjoined.¹⁰³

Disagreement between the courts occurs when the resemblance deceives only the careless or indifferent purchasers. Thus, it has been held that deception of the casual buyer gives no right of action.¹⁰⁴ Yet, other courts have protected the casual buyer.¹⁰⁵ The relief, in such cases, is founded upon the theory that "the casual buyer lives and buys by symbols" and should be protected from the calculated deception of a producer.¹⁰⁶ In many fields, the careless, credulous

⁹⁹ *James Heddon's Sons v. Millsite Steel and Wire Works, Inc.*, 128 F. 2d 6, 53 U.S.P.Q. 579 (6th Cir. 1942).

¹⁰⁰ See the dissenting opinion of Judge Rippey in *Pocket Books, Inc. v. Myers*, 292 N.Y. 58, 65, 54 N.E. 2d 6, 10 (1944).

¹⁰¹ *American Automobile Assn. v. American Automobile Owners Assn.*, 216 Cal. 125, 138, 13 P. 2d 707, 713, 14 U.S.P.Q. 263, 269 (1932).

¹⁰² Case note 13 IND. L. J. 286, 287 (1938); *Lever Bros. v. J. Eavenson & Sons*, 157 Misc. 297, 283 N.Y. Supp. 398 (N.Y. Sup. Ct. (1935); *Southern Calif. Fish Co. v. White Star Canning Co.*, 45 Cal. App. 426, 187 Pac. 981 (2d App. D. 1920).

"A new competitor is not held to the obligations of an insurer against all possible confusion. He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference . . . It has been said that he is not required to make the market 'foolproof' . . ." *Life Savers Corp. v. Curtis Candy Co.*, 182 F. 2d 4, 8, 85 U.S.P.Q. 440, 443 (7th Cir. 1950).

". . . Instead, they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken." *Fruit Growers Co-operative v. M. W. Miller & Co.*, 170 F. 2d 834, 837, 79 U.S.P.Q. 347, 349 (7th Cir. 1948).

¹⁰³ *Hill Bread Co. v. Goodrich Baking Co.*, 89 Atl. 863 (N. J. Ch. 1913).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Miller Brewing Co. v. Blatz Brewing Co.*, 90 U.S.P.Q. 360, 361 (Wisc. Cir. Ct., Milwaukee City, 1951); *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. 2d 949, 50 U.S.P.Q. 165 (8th Cir. 1941).

¹⁰⁶ *Miller Brewing Co. v. Blatz Brewing Co.*, *supra*.

and ignorant purchasers are numerous and the viewpoint is that they should not be confused by the simulation of an article.¹⁰⁷ One court went so far as to admit that as "a purely legalistic principle," the law should give protection only to the reasonably prudent buyer; nevertheless, it brushed aside the rule contending that as a matter of common sense the casual buyer — a unit of the buying public consisting of the wise and the ignorant, the indifferent and the cautious, and the casual and the careful — is entitled to protection from the deceptive practices of manufacturers.¹⁰⁸

The courts have not applied any systematic or consistent policy to the varying degrees of care given to the purchase of different articles by the ordinary buyer. Generally, the same degree of attention is not given to the purchase of inexpensive and trifling items as is to the more expensive and substantial commodities. There are also varying degrees of attention given to the purchase of articles which lie between these extremes. Nor are the class of purchasers (children, servants, skilled tradesmen, etc.), the frequency of the purchases of the product or physical location when bought considered by the courts with any measure of consistency or by any standard.¹⁰⁹

Thus, to illustrate, in the purchase of milk, an inexpensive item which is frequently bought, the degree of care of the ordinary buyer is not great. The amount of care exercised in such purchases is further reduced when the milk is bought in a self-service store, for there the customer makes his purchases by general impression and uses little care in differentiating between milk containers.¹¹⁰

Further, the similarity in appearance of a medicinal tablet would be more significant than an article of furniture. The question of origin as to furniture is significant only as to design, materials and craftsmanship. These elements can very largely be judged by the purchaser through his examination of the article. In the case of the drug, its efficiency depends on the indeterminable qualities of manufacture which relate to skill and integrity; therefore, the purchaser is more concerned with the source of this product than with others.¹¹¹

The courts have followed two conflicting rules for detecting

¹⁰⁷ In considering the simulation of an automobile lamp, the court of appeals for the second circuit stated, "An expert and probably a great majority of automobile purchasers could not be deceived . . . but the ignorant or careless purchaser looking to general effect, and not to what seems to him to be inconsequential details, would, very likely, be misled." *Rushmore v. Badger Brass Mfg. Co.*, 198 Fed. 379, 380 (2d. Cir. (1912)).

¹⁰⁸ *Miller Brewing Co. v. Blatz Brewing Co.*, *supra*, note 106.

¹⁰⁹ *Hi-Land Dairyman's Assn. v. Cloverleaf Dairy*, 107 Utah 68, 151 P. 2d 710, 63 U.S.P.Q. 31 (1944); *Deister Concentrator Co. v. Deister Machine Co.*, 63 Ind. App. 412, 112 N.E. 906 (1916).

¹¹⁰ *Hi-Land Dairyman's Assn. v. Cloverleaf Dairy*, *supra*.

¹¹¹ *Upjohn Co. v. Wm. S. Merrell Chemical Co.*, 269 F. 2d 209 (6th Cir. 1920).

resemblances and differences between articles. One is the side by side ocular comparison of the exhibits by the court.¹¹² Under this procedure, the objects of disputed similarity are placed side by side so that the sizes, shapes, colors and forms may be brought into juxtaposition to determine if confusion or likelihood of confusion between the products exists.

There is disagreement between the courts and secondary authorities as to the fairness of this procedure. It has been categorically called, "the approved test and the only way by which similitudes and differences may be compared."¹¹³ Nims, on the other hand, considers this test to be obviously inadequate, "when one considers how seldom in actual purchase of goods the buyer has the opportunity of placing the various brands of competing goods side by side and comparing them as carefully as does a judge in the judicial atmosphere of a court room."¹¹⁴

This unrealistic approach is in contrast with the memory test. Where a buyer has only one article before him, he can only compare it with his memory of the other. The test of similarity, under such circumstances, has been held to be a memory comparison and not a visual comparison.¹¹⁵ Nims, in supporting the memory test, contends that the issue is not whether there is a recognizable difference between the articles placed side by side but whether there is a difference which the purchaser, having no opportunity to compare the products, will recognize.¹¹⁶ However, the courts often ignore these factors and arbitrarily apply the visual test. What is even more disturbing is that a court on occasion, with the disputed articles before it, mistakes the one for the other yet insists that there is insufficient confusion to warrant relief.¹¹⁷

D. Secondary Meaning.

The extension of the secondary meaning doctrine to protect activities of modern origin or of fairly recent development has been met with no little difficulty. These complications have led to strained reasoning in the application of the doctrine to trade-names, to titles

¹¹² American Automobile Assn. v. American Automobile Owners Assn., *supra*, note 101; Avrick v. Rockmont Envelope Co., 64 F. Supp. 765, 67 U.S.P.Q. 229 (D. Colo. 1945).

¹¹³ American Automobile Assn. v. American Automobile Owners Assn., *op. cit.* note 101, at 138.

¹¹⁴ 2 Nims, *op. cit.* note 3, at 1019.

¹¹⁵ Lektro-Shave Corp. v. General Shaver Corp., 19 F. Supp. 843 (D. Conn. 1937).

¹¹⁶ 2 Nims, *supra*, note 114.

¹¹⁷ *Id.* at 1020.

of books, plays and songs and to the non-functional features of articles.

An increasingly critical view has been taken of the secondary meaning doctrine under which relief is contingent upon a demonstration that the public associates the trade-name or product with its source rather than with the goods.¹¹⁸ This principle has been criticized in part as being a mere fiction for the interest protected in these cases is not in the association of the article with its origin but in its name for which there is a created demand.¹¹⁹ Judge Crane of the New York Court of Appeals realistically argued that when "Uneda biscuits or Cremo cigars or talcum powder" are bought, the purchaser does not have the producer in mind.¹²⁰ The public has little interest in the corporate structure of the producer which may undergo many changes unbeknown to them, yet the demand for the article through use of the trade-name is present. The public interest or good will in the article is keyed to the specific name given it, which, through advertising and general acceptance, has become popular.

The difficulty of establishing secondary meaning in a complex industrial society is recognized by the courts through the liberalization of the rule. It is not necessary in the modern setting to demonstrate public awareness as to the personal identity of the producer. It suffices to show "that whatever is asserted to carry the secondary meaning has come to signify origin from a single, though anonymous source."¹²¹

¹¹⁸ In *Kellogg Co. v. National Biscuit Co.*, *op. cit.* note 85, at 118, Mr. Justice Brandeis said, "It must be shown that the primary significance of the term in the minds of the consuming public is not the product but the producer."

The same principle relates to non-functional features. The court, in *Sinko v. Snow-Craggs Corp.*, 105 F. 2d 450, 453 (7th Cir. 1939), applied it with these words: "... Sinko created a desire on the part of the public for one of two things, either for knobs made by Sinko, above all other knob makers, or for knobs made in a particular manner regardless of who made them. If it is the first situation, the law of unfair competition gives Sinko the right to monopolize or to exclude other makers from copying the product. If it is the latter situation, Sinko receives no such right to monopolize, even though he might have been the first one to make the article in the particularly desirable manner."

Judge Learned Hand, in *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 Fed. 299, 301 (2d Cir. 1917), said, "It is not enough to show that the wrench became popular under the name 'Crescent'; the plaintiff must prove that before 1910 the public had already established the habit of buying it, not solely because they wanted that kind of wrench, but because they also wanted a Crescent, and thought all such wrenches were Crescents."

¹¹⁹ See Judge Crane's dissent in *Gotham Music Service, Inc. v. Denton and Haskins Music Pub. Co.*, 259 N. Y. 86, 181 N.E. 57 (1932), *rehearing denied*, 259 N. Y. 629, 182 N.E. 211 (1932).

¹²⁰ *Ibid.*

¹²¹ *California Apparel Creators v. Wieder of California, Inc.*, 162 F. 2d 893, 897, 74 U.S.P.Q. 221, 224 (2d Cir. 1947).

In the landmark case of *Crescent Tool Co. v. Kilborn and Bishop Co.*, *op. cit.* note 118, at 300 Judge Learned Hand states the proposition as follows:

This identification is made in some manner, as through a trade-name, so that association as to source, in its original sense, is lost and meaningless. The criticism here is not registered against the broadening of the doctrine to meet current industrial requirements but in the continuous use of old terms to mean new things. The result is not only confusion as to the meaning of terms but also inconsistency in the application of the doctrine.

The unwieldiness of secondary meaning as applied to the title of a book, a play or a song is easily demonstrated. The general proposition is that an author, a playwright or a composer has no inherent right in the title of his publication.¹²² Only when the title has secondary meaning which identifies it in the public mind with the book, the play or composition is the creator entitled to its exclusive use.¹²³ This principle is contrary to a fundamental precept of secondary meaning, namely, the public must identify the *source of origin* of the product rather than the *goods* if relief is to be given. In these cases, inconsonant with secondary meaning, protection is contingent upon identification with the product — the book, the play or the song — and the producer's participation is not even remotely considered. The demand is for a specific book, play or song with little or no public interest shown in the publisher.¹²⁴ Again, the ultimates recognized by the courts are supportable; however, the measures employed conflict with and are contradictory to the basic precepts of secondary meaning.

Questions have also been raised regarding the various methods used to prove secondary meaning. The single factual issues in these cases is: What is the import of the disputed word or product as it is understood by the buyers?¹²⁵ If the buyers identify the word or product only with the kind of goods sold and do not associate it with the source, there is no secondary meaning and a basis for relief is not established. It would seem clear from this that the attitude of the

"... it is apparent that it is an absolute condition to any relief whatever that the plaintiff in such cases show that the appearance of his wares has in fact come to mean that some particular person — the plaintiff may not be individually known — makes them, and that the public cares who does make them, and not merely for their appearance and structure. It will not be enough only to show how pleasing they are, because all the features of beauty or utility which commend them to the public are by hypothesis already in the public domain."

¹²² *Jackson v. Universal International Pictures, Inc.*, 36 Cal. 2d 116, 222 P. 2d 433, 87 U.S.P.Q. 131 (1950).

¹²³ *Ibid.*

¹²⁴ To illustrate that the demand is for the song and not the publisher see *Gotham Music Publishing Co. v. Denton & Haskins Music Pub. Co.*, *supra*, note 119.

As to a book — "demand is for the intrinsic character of the reprints denoted by the title, the text, the popularity of the author's writing, not for the producer." *Pocket Books, Inc. v. Meyers*, 292 N.Y. 58, 63, 54 N.E. 2d 6, 9 (1944).

¹²⁵ *Bayer Co. v. United Drug Co.*, 272 Fed. 505, 509 (S. D. N. Y. 1921). See Annotation 150 A.L.R. 1067, 1080.

buyers should be decisive in determining whether the first user has successfully identified himself in the public mind with the trade-name or product. But such has not always been the case, for courts have held that the buyers are seldom reliable interpreters of their mental reactions.¹²⁶ Therefore, in those cases, only slight weight has been given to such testimony. Retailers and salesmen, who are in contact with the public, have been judged the more reliable witnesses to instances of public confusion or deception.

In determining whether the simulation of non-functional features of goods should be enjoined, the courts are generally faced with the following fundamental issues:

1. Are the imitated features functional or non-functional? If they are functional, they are within the public domain and may generally be copied in every detail. On the other hand, if the simulated features are non-functional, the crucial issues are (The following factors apply also to the copying of trade-names.):

2. Did the first user establish a secondary meaning?

3. If so, did the conduct of the second user create a likelihood of confusion as to the source?¹²⁷

The Court of Appeals in the Second Circuit in the *Crescent* case¹²⁸ articulates these precepts, which have been followed by most courts.¹²⁹ Difficulty develops when the lower court fails to make a finding of fact on the issue of secondary meaning. In the absence of

¹²⁶ *Premier-Pabst Corp. v. Elm City Brewing Co.*, 9 F. Supp. 754, 23 U.S.P.Q. 84 (D. Conn. 1934).

But see Skinner Mfg. Co. v. General Foods Sales Co., 52 F. Supp. 432 (D. C. Neb. 1943), *aff'd* 143 F. 2d 895 (8th Cir. 1944), *cert. denied* 323 U.S. 766 (1944) and *Steem-Electric Corp. v. Herzfeld-Phillipson Co.*, 118 F. 2d 122 (7th Cir. 1940), where the testimony of consumers is given greater weight than dealers, experts and other specialists.

¹²⁷ *General Time Instrument Corporation v. United States Time Corporation*, *supra*, note 40.

In *American Fork and Hoe Co. v. Stampit Corp.*, *supra*, note 29, the court denied an injunction in the absence of secondary meaning. It said, "In light of this conclusion we need not consider whether the resemblance between the appellant's and appellee's rakes is founded upon functional or non-functional features, a branch of the case which, due to the meagerness of the record, could not be adequately discussed." p. 476. So the court side-stepped the functional - non-functional issue, assumed the features to be non-functional, and ruled that secondary meaning was absent. Then the court reasoned backwards from its conclusion and decided that a finding as to the functional or non-functional features was unnecessary — a technique devised to overcome the deficiencies of the record.

¹²⁸ *Supra*, note 118.

¹²⁹ *Grier Bros. v. Baldwin*, 219 Fed. 735 (3d Cir. 1915); *Bayley and Sons, Inc. v. Braunstein Bros. Co.*, 246 Fed. 314 (S.D.N.Y. 1917); *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, *supra*, note 105; *American Enameled Products Co. v. Illinois Porcelain Enamel Co.*, 123 F. 2d 631, 51 U.S.P.Q. 404 (7th Cir. 1941); *American Fork and Hoe Co. v. Stampit Corp.*, *supra*, note 29.

a finding, the appellate courts have been known to infer no secondary meaning.¹³⁰ Judge Frank correctly criticizes this practice. In the *General Time Instrument* case,¹³¹ Judge Frank concludes that the court below intentionally refrained from making a finding of fact as to secondary meaning and that the appellate court incorrectly inferred the absence of secondary meaning from this lack of finding. What is at issue here is not Judge Frank's interpretation of the vague findings but the failure of the appellate court to insist upon special findings as to each issue and in their absence, as Judge Charles E. Clark suggests, call for further findings rather than final dismissal.¹³²

This casualness initiates in the lower court and continues through the appellate review. It should not matter in these cases which present no doctrinal novelties what the judicial attitudes are to invoking the principle of secondary meaning; yet, through the lax treatment of the issues, the economic attitude of the judiciary assumes fundamental portent and not infrequently is determinative of the results.

To illustrate this lack of precision, in *Miller Brewing Co. v. Blatz Brewing Co.*,¹³³ the Wisconsin court made no finding as to secondary meaning, limiting its consideration to the likelihood of deception. The Second Circuit Court of Appeals, the most active of our commercial courts, has been equally guilty of this casualness. In *Swanson Mfg. Co. v. Feinberg - Henry Mfg. Co., Inc.*,¹³⁴ the Court failed to determine whether the features were functional or non-functional. *Meisner v. Meisner*,¹³⁵ contains no findings by the New York Supreme Court as to functional or non-functional features and secondary meaning.

The *Rushmore* cases¹³⁶ are cited for the minority view that the

¹³⁰ *General Time Instrument Corp. v. United States Time Corp.*, *supra*, note 40; *Lewis v. Vendome Bags, Inc.*, 108 F. 2d 16, 43 U.S.P.Q. 477 (2d Cir. 1939).

¹³¹ *General Time Instrument Corp. v. United States Time Corp.*, *supra*.

Judge Frank suggests that trial judges be required in all cases to publish special findings of fact. See his article, "Short of Sickness and Death: A Study of Moral Responsibility in Legal Criticism," 26 N.Y.U. L. REV. 545, 632 (1951).

¹³² *Lewis v. Vendome Bags, Inc.*, *ibid*.

¹³³ 90 U.S.P.Q. 360 (Wis. Cir. Ct., Milwaukee City 1951). Also in *Western Lithograph Co. v. W. H. Brady Co.*, 71 F. Supp. 383, 74 U.S.P.Q. 63 (E.D. Wis. 1947), the court did not specifically consider the element of secondary meaning.

In *Rymer v. Anchor Stove and Range Co.*, 70 F. 2d 386 (6th Cir. 1934), evidence of confusion as to source was held to be sufficient to demonstrate the presence of secondary meaning.

¹³⁴ 147 F. 2d 500, 64 U.S.P.Q. 316 (1945).

¹³⁵ 29 N. Y. S. 2d 342, 50 U.S.P.Q. 33 (N.Y. Sup. Ct. 1941).

¹³⁶ *Rushmore v. Saxon*, 154 Fed. 213 (Cir. Ct., S.D.N.Y. 1907); 158 Fed. 499 (Cir. Ct., S.D.N.Y. 1908); *Rushmore v. Manhattan Screw and Stamping Works*, 163 Fed. 939 (2d Cir. 1908); *Rushmore v. Saxon*, 170 Fed. 1021 (2d Cir. 1909); *Rushmore v. Badger Brass Mfg. Co.*, 198 Fed. 379 (2d Cir. 1912).

simulation of non-functional features may be restrained without a showing of secondary meaning "if the similarity is likely to deceive purchasers."¹³⁷ Yet a study of the *Rushmore* cases apparently reveals that they hold no such broad ruling.¹³⁸ The injunction in the first *Rushmore* decision was based on active passing off and secondary meaning. The second and fourth cases were decided by the secondary meaning doctrine. The third decision brought elements of the first case in line with the second and made no new findings. The confusion as to the rulings in the *Rushmore* cases appears to stem from the court's headnote to the second *Rushmore* decision: "One who manufactures and sells a *well-known* (italics added) article of commerce, like an automobile search light, inclosed in a shell of graceful but unpatented design, may maintain a bill of injunction, profits, and damages against a defendant who sells an automobile search light inclosed in a similar shell, although his name appears prominently thereon as maker, and he has never represented that his lamps were made by complainant, if it is shown that the similarity of the shells does, or is likely to deceive purchasers."

The latter clause, "similarity . . . is likely to deceive purchasers," was eagerly fallen upon by some courts to allow relief in non-functional feature cases without requiring the showing of secondary meaning. However, they failed to realize that in the *Rushmore* case the court was referring to "a well-known article of commerce," in other words, one in which secondary meaning is presupposed. Thus, it would seem, the *Rushmore* cases articulated no new principle. They illustrate, however, what misconception may follow from the failure of a court to enunciate in detail the crucial issues and findings in a case.

Further support for the *Rushmore* doctrine is found in the dictum of *Enterprise Mfg. Co. v. Landers, Frary & Clark*,¹³⁹ which with *Yale & Towne Mfg. Co. v. Alder*¹⁴⁰ are cited in the second *Rushmore* opinion. In the *Enterprise* case the court said, "There is evidence to show that purchasers have been deceived as to the identity of these mills, but, in the case of a Chinese copy, such as defendants offer to the public, such proof is hardly needed." But both the *Enterprise* and *Yale* cases "presuppose that the appearance of the article had a secondary meaning and had been associated in the public mind with the first comer as a manufacturer or source of supply."¹⁴¹ This is

¹³⁷ 2 Callmann *op. cit.* note 3, at 1036.

¹³⁸ The writer intends to elaborate on this thesis in a future article.

¹³⁹ 131 Fed. 240 (2d Cir. 1904).

¹⁴⁰ 154 Fed. 37 (2d Cir. 1907).

¹⁴¹ This opinion is expressed in *Sinko v. Snow-Craggs Corp.*, *op. cit.* note 29, at 453. For concurring views see *Unique Art Mfg. Co. v. T. Cohn, Inc.*, 81 F. Supp. 742, 745 (E.D.N.Y. 1949) and *Crescent Tool Co. v. Kilbourn & Bishop Co.*, *op. cit.* note 118, at 300. In the latter case, Judge Learned Hand clearly stated the propo-

certainly consistent with the holding in the second *Rushmore* case.

The misinterpretation of the second *Rushmore* decision rests on its presupposition of secondary meaning, an assumption also followed in the *Enterprise* and *Yale* cases. In such instances, since secondary meaning is assumed, the element of proof of secondary meaning — one which generally is not easy to demonstrate — is not clearly described by the courts. While the absence of precise description does not modify the law so as to negate the requirement as to secondary meaning, it may, however, substantially affect the proof of association as to source.

Yet a "Rushmore doctrine" has been pronounced by the courts which provides for relief from the simulation of non-functional features without a showing of secondary meaning where the similarity is likely to deceive or confuse buyers.¹⁴² To what extent this is an abrogation of the requirement that secondary meaning be proved or is the result of presupposition is not clear. If the former is the case, how can there be confusion as to source without a secondary meaning attaching itself to the article? This question is fundamental and has been left unexplained by those courts which have given support to a "Rushmore doctrine."

Nims speaks of a general rule "that it is unfair to copy the form or shape of any physical characteristic of another's goods, if by so doing one's own goods may be passed off as those of that other."¹⁴³ This principle was enunciated as early as 1904 in the *Enterprise* case which held that "a court of equity will not allow a man to palm off his goods as those of another, whether his misrepresentations are made by word of mouth, or, more subtly, by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor."¹⁴⁴ Although the *Enterprise* decision was based on the doctrine of secondary meaning, the above

sition: "The cases of so-called 'non-functional' unfair competition, starting with the 'coffee mill case,' *Enterprise Mfg. Co. v. Landers*, . . . are only instances of the doctrine of 'secondary' meaning. All of them presuppose that the appearance of the article like its descriptive title in true cases of 'secondary' meaning, has become associated in the public mind with the first comer, as manufacturer or source, and, if a second comer imitates the article exactly, that the public will believe his goods have come from the first, and will buy in part, at least, because of that deception." Nor does the Second Circuit Court of Appeals, which rendered the *Rushmore* decisions, anywhere support or give effect to the "Rushmore doctrine."

¹⁴² *Grant v. California Bench Co.*, 71 U.S.P.Q. 214 (Cal. D.C. of App., 2d Dist. 1946); *Hi-Land Dairyman's Assn. v. Cloverleaf Dairy*, 107 Utah 68, 151 P. 2d 710, 63 U.S.P.Q. 31 (1944); *Scudder Food Products, Inc. v. Ginsberg*, 21 Cal. 2d 596, 134 P. 2d 255, 56 U.S.P.Q. 542 (1943). For a criticism of the majority rule as well as the "Rushmore doctrine" see 2 Callmann, *op. cit.* note 3, at 1037. See also Oppenheim *op. cit.* note 4, at 256 fn. 118.

¹⁴³ 1 Nims, *op. cit.* note 3, at 384.

¹⁴⁴ *Op. cit.* note 139, at 241.

quotation was modified later to form the thesis for granting relief in simulation cases, the essence being a broadened theory of "passing off."¹⁴⁵

It appears that the "passing off" doctrine has been used to avoid or minimize the requirement that secondary meaning be proved. When shorn of verbiage, its significance and effect are substantially the same as in the "Rushmore doctrine" cases, with the attending confusion as to whether a showing of secondary meaning is required. In its early sense, "passing off" was in no way related to secondary meaning, but since "passing off" has also been used to prohibit the copying of non-functional features, that is no longer the case. The effect has been an obfuscation of the meaning of "passing off." Is simulation alone sufficient to constitute "passing off" or must there be an association of the non-functional features of an article in the buyer's mind with its producer or source?¹⁴⁶ It would appear that simulation alone will not support an injunction against "passing off," for in such cases if there is no deceit there can be no unfair competition.¹⁴⁷ But how is deceit shown? What proof is necessary to establish the presence of deceit? These are indefinite elements which are made more uncertain by the frequent failure of the courts to specify clearly the findings necessary to grant relief against "passing off." Since secondary meaning is required to show deception as to source, such findings should be precisely articulated by the courts. As a minimum, they should provide sufficient information to support, however weakly, a presupposition of secondary meaning. Or if deception is determined by a rationale other than secondary meaning, that reasoning should be made known.

E. Likelihood of Confusion.

Conceptual and procedural variances as to the proof required for establishing a likelihood of confusion in secondary meaning cases is clearly illustrated by the recent case of *Chas. D. Briddell, Inc. v.*

¹⁴⁵ The early cases on unfair competition related to the verbal passing off of one article for another. Later, "passing off" was defined to include the imitation of non-functional features of products.

¹⁴⁶ See *Thomas Kerfoot & Co. v. Blackman & Blackman, Inc.*, 4 U.S.P.Q. 136 (S.D.N.Y. 1930). In this case a finding of secondary meaning was not made. Was it established without a finding, was it presupposed or was proof of secondary meaning unnecessary?

¹⁴⁷ An action for deceit would not lie against a chain store for palming off packaged coffee where the label of the chain store package clearly identified the producer, although the arrangement and massing of colors on the packages of the competing coffees were similar. *Winston & Newell Co. v. Piggly Wiggly Northwest, Inc.*, 221 Minn. 287, 22 N.W. 2d 11 (1946).

*Alglobe Trading Co.*¹⁴⁸ In his dissent to the majority holding, Judge Charles E. Clark, with characteristic astuteness, points to the court's contradictory conclusion that in practice there must be a showing of actual confusion if relief is to be granted notwithstanding the governing requirement that only a *likelihood* of confusion need be demonstrated.¹⁴⁹ He notes that the evidence¹⁵⁰ in the case as to secondary meaning and confusion was unchallenged and was sufficient to convince the trial judge that there was a *likelihood* of confusion. Yet, on its findings — a comparison of the competing cutlery and an examination of the documentary evidence — the higher court substituted its conclusions for those of the trial court. This action by the appellate court was due in part to its opinion that the design of the cutlery could not assume distinctive characteristics. If this were true, the simulated features would be functional and could be freely copied. However, Judge Frank, in the majority opinion, showed no desire to conclude the argument with this principle — a common stopping point. He continued his line of reasoning by assuming, "arguendo," that the design was non-functional. Then, after limiting the evidence, he concluded that there was no *likelihood* of confusion in the absence of *actual* confusion. And in spite of this result, he announced the principle that in secondary meaning cases it suffices to show only a likelihood of confusion to prevent imitation!

As Judge Clark observed, this is new law — but it is not a new practice. To obtain relief from the imitation of non-functional features of articles, complainants generally attempt to establish confusion by introducing evidence of actual deception, notwithstanding the less formidable requirements of the law. This practice is generally followed, although it is more difficult to prove actual confusion, since the courts, quite naturally, give greater weight to such evidence.¹⁵¹ In fact, the unhappy experience of the plaintiff in the *Briddell* case would seem to substantiate the wisdom of following the more formidable procedure.

Further, not only have the courts held various views as to the

¹⁴⁸ 92 U.S.P.Q. 100 (2d Cir. 1952).

¹⁴⁹ *Id.* at 104.

¹⁵⁰ The evidence as to likelihood of confusion consisted of two unverified letters addressed to the plaintiff, according to Judge Frank in the majority opinion. Judge Clark holds this to be an error for the affidavit of a manufacturers' representative stated "that customers, department store buyers, and others interested in plaintiff's line were inquiring as to this 55-per-cent-cheaper product and jobbers were holding off from placing further orders. Doubtless . . . [the representative] should be subjected to cross-examination, but his statement should not be either ignored or limited as in the opinion. Of some importance, too, is the affidavit of the expert pointing out in detail the several items of surface resemblance, but inner differences of quality between the competing knives." *Ibid.*

¹⁵¹ Nims, *op. cit.* note 3, at 1047.

functional features of designs, but the attitudes of some individual judges have reflected conceptual vacillation and procedural inconsistency. To illustrate, in the *Bridell* case Judge Frank supports the theory that the free simulation of articles is of the essence of a competitive society; thus, to insure the widest range of competition, in this case he considers the design of a knife to be within the public domain. However, in the *General Time Instrument Corp.* case¹⁵² he wrote a strong dissent based on the theory that the design of a clock was non-functional, thus narrowing the concept as to competition.¹⁵³ One might with justification inquire as to the soundness of a conceptual philosophy of competition which is determined by the features of articles, such as design, rather than by economic and social forces. It is such conceptual vagaries which have created much of the confusion and uncertainty prevailing in the law of unfair competition.

JURAL RELATIONS

The difficulty in formulating consistent policies and standards for commercial activity is due in a large measure to differences between the basic values and objectives in a competitive society. While values and normative judgments form essential components of social action, their validity is determined by the broadest socio-economic concepts. Since validity under the judicial process is not infrequently contingent upon the philosophic remonstrations and economic predilections of individual judges and not necessarily on social expression or group practice, the resulting difference in policy and opinion are inevitable. What is required, if commercial needs are to be more uniformly satisfied and consistently measured, is the review, the reformulation and the implementation of basic values and normative judgements.

Chief Justice Stone, in evaluating the objectives of law, stated that, "Law performs its function adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and future"¹⁵⁴

¹⁵² *Supra*, note 127.

¹⁵³ However, the Court of Appeals for the Second Circuit in recent years has followed a generally consistent policy as to the design of articles. See *supra*, note 90 and textual discussion.

¹⁵⁴ Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11 (1936).

The United States is the citadel of free competition; yet for many years noticeable governmental encroachments have been made upon this province. The federal government, while espousing a philosophy of unrestrained competition, has assumed increasingly active regulatory authority over our economic order. These restraints on competition were introduced to curb the abusive commercial practices which were inevitable under a *laissez-faire* policy. Without these safeguards, the honest businessman would be placed at a decided competitive disadvantage. Also, paradoxically, unrestrained competition in an industrial economy results in concentrations of economic power which are the antitheses of a free economy. Federal regulation in the economic sphere, therefore, was necessary to effectuate the principles of free competition.¹⁵⁵

While it is recognized that the adequate protection and control of economic interests come within the special province of the law, those measures should reflect a policy of unity of purposes and an accommodation of conflicting economic interests. However, the inadequacy and inconsistency of legal conceptualism as to economic matters reveal an absence of definitive standards and coherent policy capable of reliable application. This poverty of conceptualism is demonstrated at the legislative level by the conflict between the copyrights law and the federal anti-trust laws,¹⁵⁶ and in the Federal Trade Commission's policy of curtailment of competition under section 2 (b) of the Robinson-Patman Act and the increase of competition under the Department of Justice's enforcement program as to the Clayton and Sherman Acts.¹⁵⁷ At the judicial level the unsettled nature of economic policy is illustrated by Judge Learned Hand's opinions in *Ely-Norris Safe Co. v. Mosler Safe Co.*¹⁵⁸ and in *Cheney Bros. v. Doris Silk Corp.*¹⁵⁹ In the *Ely-Norris* case, Judge Hand followed the theory that injury rather than the means of its infliction should be controlling. However, in the *Cheney* case the method of inflicting the injury determined the basis for relief.

¹⁵⁵ SCHWARTZ, *AMERICAN ADMINISTRATIVE LAW* 9 (1950).

¹⁵⁶ See *White, Musical Copyrights v. The Anti-Trust Laws*, 30 NEBR. L. REV. 50 (1950).

¹⁵⁷ See *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1950). The minority in this case, while agreeing with the interpretation of the Federal Trade Commission, admitted that that view would "weaken competition;" however, they concluded that Congress had intended such results. See also Simon, *The Case Against the Federal Trade Commission*, 19 U. OF CHI. L. REV. 297, 316 (1952).

¹⁵⁸ 7 F. 2d 603 (2d Cir. 1925), *reversed in* 273 U.S. 132 (1926). This case was decided by the United States Supreme Court in line with the theory of secondary meaning. Subsequently, federal legislation as to false advertising was enacted. Wheeler-Lea Amendment to the Robinson-Patman Act, 52 STAT. 111, 15 U.S.C. § 45 (1938).

¹⁵⁹ 35 F. 2d 279 (2d Cir. 1929).

These conceptual conflicts can be explained partially by historical interpretations. Our government was founded upon precepts which are the embodiment of natural law. Instinct and the theory of right reason became the source for the introduction of law and for the establishment of precedent. Through the facility of a common tongue, the English cases provided suggestions for resolving local problems and controversies. Thus, the English law, with modifications to meet domestic conditions, became a basis for social control. Interstitial variants, embodying civil law, were introduced, along with common law precepts, by Story and Kent.

The law of unfair competition did not begin to take format until after the eighteen seventies with the coming of the era of the "robber barons." The industrial need for stability and certainty found its jural counterpart. Llewellyn suggests two reasons for the commercial need for legal certitude during this period: The "empire builders" required predictability and a stable law, "that means [law] . . . sufficiently strait-jacketed in out-moded moulds not to catch up too fast with novel predatory practices."¹⁶⁰ The dominant philosophy of legal positivism supplied the needs through case law with minimal legislation. It conveniently omitted rumination as to right reason, value judgment or ethics. It acknowledged only that law "as is" is law and that Justice, while it may be an ideal, in practice is an accident. Thus, the ideology of America was directed and influenced by business interests. While this was a cold philosophy, lacking in humanitarian concern for the hordes of immigrant labor, it implemented commercial growth and formed the basis for a substantial contribution by business to the development and the well-being of the country.

Although positivism insisted upon certitude, discordancy in judicial law was frequently troublesome. This gave rise to the problem of dealing with "discordant precedents," each of which created positive, although conflicting, rules. Positivism, therefore, presented variable rulings; those in terms of time, place or circumstances, which provided "sound" decisions became precedent. This did not, unfortunately, effectuate the formulation and adoption of single legal propositions for under different settings the contrary rulings may have been applied with equal validity and effect.

Toward the end of the nineteenth century the unrest of labor, the disaffection of farmers and the cries of small businessmen in opposition to the Trusts fomented some legal change with a re-emphasis on value judgment. But unfair competition remained an area dominated by jural positivism. The conflict between public and private interests, the absence of judicial alacrity in restraining unscrupulous business practices, the vapidity and inconsistency of precepts and the

¹⁶⁰ Llewellyn, *On Philosophy in American Law*, 82 U. OF PENNA. L. REV. 205, 208 (1934).

subjective discordancy reflected in judicial decisions were evidences of the inability of positivism to meet the demands of an increasingly complex society. Thus, sociological jurisprudence spearheaded the revolt against positivism and reintroduced social ethics into private law. In determining social values, "right" reason was again applied with emphasis on the adjustment of conflicting social interests. Unsystematic and desultory legislative and administrative impetuses were applied to the control of trade practices, but a sustained and scientific evaluation of the law was not attempted. Conflicts in case law and trade legislation continued to mount and the advent of realistic jurisprudence further accentuated legal discordancies.

Professor Northrup suggests the application of sociological jurisprudence to the American society to determine both the "positive legal rules" and "living law norms" just as the anthropologist Kluckhohn applied it to the society of the Navajo Indians. He contends that men like Kluckhohn and Sorokin have established that the "living law norms" of a society remain indefinite and the "positive legal rules" unintelligible unless the philosophy of the society is brought to the forefront. In that manner sociologists like Sorokin and anthropologists like Kluckhohn search out the positive law and the fundamental living law norms of a culture to determine its philosophy. This is the procedure which he recommends we apply to our own society.

But the halls of jurisprudence are open also to the other disciplines. In that way, through a critical synthesis, the useful features of each theory can be employed to gain insight into the precepts and ideals of the law. Thus, positive jurisprudence is valuable in applying logic to law. As Professor Stone has said, "The 'logical form' is not 'fallacious' within its own proper universe of discourse. It is only outside this universe of discourse that Holmes' 'cynical acid' would wash the fallacy of the logical form along with the observer's moral presuppositions from the predictions of law."¹⁶¹ Historical jurisprudence is useful in interpreting law according to a historical theory. Natural law is helpful in understanding and formulating value judgments. The Utilitarians provide the legislative process for improving the administration of justice. To the extent that psychology, economics, anthropology and other disciplines are applicable, each contributes to the evaluative process.

This utilization of the significant attributes of the various jural theories may demonstrate that the legal philosophies are not wholly competitive but, in fact, are almost completely complementary. To what degree it would result in a synthesis, as envisioned by Hall,¹⁶²

¹⁶¹ STONE, *THE PROVINCE AND FUNCTION OF LAW* 26 (1946).

¹⁶² See his *Integrative Jurisprudence* in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 313 (Ed. Sayre, 1947).

and Cairns,¹⁶³ rather than an interrelation of particularistic theories remains to be seen. Also, this procedure may mean the disappearance of some schools as distinct branches of jurisprudence, such as may result from the fusion of the historical school with sociological jurisprudence.¹⁶⁴

There are some differences of opinion as to whether jurisprudence can effectively operate as a social science so long as the improvement of the administration of justice is its objective. Mr. Cairns thinks that legal research has wrongfully forced upon jurisprudence the role of improving the law. This he believes is a reaction to the indifference and disdain which the bar has felt since the nineteenth century towards jural theory. In the opinion of Cairns, jurisprudence should not be restrained by the artificial limitations of legal reform in its search for "invariant relationships among the facts." He concludes that so long as it engages in legal technology it cannot become legal science.¹⁶⁵ Since an adequate discussion of this problem would lead us away from our main objective, the issue will not be dwelt upon here. Each philosophic branch should have full opportunity to explore this legal province in accordance with its own tenets.

JUDICIAL PROCESS

The law of unfair competition is desperately in need of systematic elaboration. The method of dealing with it through "a body of empirical rules" has proved unsatisfactory. As Professor Morris Cohen has said, "*Stare decisis* means little in a changing society when for every new case the number of possible precedents is practically unwieldy. Without principles as guides, the body of precedents becomes an uncharted sea; and reliance on principles is worse than useless unless these principles receive critical scientific attention."¹⁶⁶

The philosopher John Dewey has been equally critical of the judicial process in America. He does not believe, however, that this means the abandonment of logic in the law. Rather, he suggests the adoption of a logic "relative to consequences rather than to antece-

¹⁶³ CAIRNS, *THE THEORY OF LEGAL SCIENCE* 11 (1941).

Oakeshott, *The Concept of a Philosophical Jurisprudence*, 3 *POLITICA* 202, 345 (1937-1938), recommends the superimposition on the existing schools, an extensive "philosophical jurisprudence" operating as "supreme" critic over the others. Professor Stone comments that "this suggestion may be of service to philosophy as such: it seems with respect, a counsel of despair from the lawyer's viewpoint." Stone, *op. cit.* note 161, at 15.

¹⁶⁴ Stone, *op. cit.* note 161, at 35.

¹⁶⁵ Cairns, *supra*, at 9.

¹⁶⁶ LAW AND THE SOCIAL ORDER 197 (1933).

dents, a logic of prediction of probabilities rather than one of deduction of certainties."¹⁶⁷

Nor does it follow that the old precepts which are operative should be abandoned without review. Instead, the alternative is to re-examine, reevaluate and modify the principles to meet more effectively social requirements. The heritage of legal principles would be preserved in that those rules which have prospective value would be given continuing validity and effect. Thus, "laws on the new basis are formulae for the prediction of the probability of an observable occurrence. They are designations of a relation sufficiently stable to allow of the occurrence of individualized situations — for every observed phenomenon is individual — within limits of specified probability, not a probability of error, but probability of actual occurrence."¹⁶⁸

Unfortunately, as our industrial order gives increasing attention to the public interest, the courts reveal a growing inability to meet social demands. Mr. Justice Brandeis recognized this limitation of the judicial process almost thirty-five years ago in his famous dissent in the *International News Service* case.¹⁶⁹ He admitted in his opinion that the courts are unable "to make the investigations which should precede a determination of the limitations which should be set upon any property rights [in that case, in news] . . .".¹⁷⁰ This weakness of the judicial process is seen also in its attempt to control other activities involving unfair trade practices. The courts are "powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations."¹⁷¹

Furthermore, although the law has grown in bulk and detail the plan of court organization has not been developed to cope with the judicial burden of mastering the extensive materials or the detailed intellectual discipline required by the many unrelated problems.¹⁷² As a result, the courts, in many of the areas of litigation, have suffered from "an indigested and indigestible mass of litigation" and rules.¹⁷³

It is the increasing inability of the courts to develop and follow

¹⁶⁷ *Logical Method and Law*, 10 CORN. L. Q. 17, 26 (1924).

¹⁶⁸ DEWEY, *THE QUEST FOR CERTAINTY* 206 (1929).

¹⁶⁹ *International News Service v. Associated Press*, *supra*, note 59.

¹⁷⁰ *Id.* at 267.

¹⁷¹ *Ibid.* However, some writers, such as Chafee, Grismore and Callmann, consider the courts not less qualified to deal with unfair competition in its broader application than the legislatures. Chafee, *supra*, note 3; Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor?* 33 MICH. L. REV. 321, 333 (1935); Callmann, *What is Unfair Competition?* 28 GEO. L. J. 585, 587 (1940).

¹⁷² KOCOUREK, *AN INTRODUCTION TO THE SCIENCE OF LAW* 183 (1930).

¹⁷³ *Id.* at 184.

a plan of systematic principles which gave fruition to legal realism and potency to the aphorism, "There is no certainty in the law."¹⁷⁴ The effects in part were a deprecation of the law, a disrespect for order and the fomentation of legal skepticism.

Jurists like Frank and Llewellyn, in questioning the efficacy of legal conceptualism, freely dramatize their theories by examples of extreme or exceptional cases. Both, however, recognize the existence of cases which present no doctrinal novelties.¹⁷⁵ It is not the ordinary but the exceptional and troublesome cases where the judge must examine related social urgencies and demands, which create the uncertainties in the law. As Llewellyn has observed, in such cases the action of the judge is unpredictable. The judge may find support in the action of a judge in an earlier case rather than from the latter's utterances. Yet, the imaginative judge may maintain a frame of reference in the current decision which is consistent with the *ratio decidendi* of the earlier case. Thus, as "every lawyer knows . . . a prior case may, at the will of the court 'stand' either for the narrowest point to which its holding may be reduced, or for the widest formulation that its *ratio decidendi* will allow."¹⁷⁶ Therefore, in some cases, the judge may subordinate "words to acts" and in other instances, conversely subserve "acts to words."

While uncertainty is an inevitable result of our complex social system, Professor Kocourek does not find in that a justification for our legal vagaries. Human conduct is patterned from certain drives, manifestations and experiences and therefore its varieties are not unlimited.

¹⁷⁴ Professor Kocourek enumerates the evils of uncertainty of legal rules as follows:

1. Business transactions often are hindered until the parties can ascertain what risks of law are involved, and in what way they may be avoided. This disadvantage manifests itself chiefly as an economic loss in the form of legal expense.
2. Litigation is encouraged in doubtful cases.
3. Transactions may be entirely impeded because of legal uncertainty.
4. Where the law is unascertainable or uncertain its moral force is weakened.
5. Uncertainty bears most heavily on those unable to bear the expense of litigation. They must give way in matters of dispute because of the risk of litigation.
6. The administration of justice will lack much in uniformity where the law is uncertain.
7. The appliers of law will be subjected more often to extra-legal influences where uncertainty exists.
8. The appliers of law will more commonly be charged with favoritism where uncertainty exists.
9. The government, in a condition of uncertainty of law becomes one of men instead of a government of law.

KOCOUREK, AN INTRODUCTION TO SCIENCE OF LAW 178-179 (1930).

¹⁷⁵ See Judge Frank's dissent in *General Time Instrument Corp. v. United States Time Corp.*, *supra*, note 40 and Professor Reuschlein's summary of Llewellyn's philosophy in his *JURISPRUDENCE — ITS AMERICAN PROPHETS* 191 (1951).

¹⁷⁶ LLEWELLYN, *CASES AND MATERIALS ON SALES*, Preface X (1930).

Kocourek contends, therefore, that the trouble stems not from the bulk of the legal data but from "the lack of conceptual tools necessary to coordinate the historical material into legal categories."¹⁷⁷

Since a judge cannot be a specialist in the wide range of legal subject-matter, his principle duty is to apply the law to the controversy at hand. Subordinate to the main judicial business, the disposition of litigation, is the investigation into the nature of the legal precepts and the examination of policy.¹⁷⁸ In the absence of a clear pattern of legal conceptualism, the judge, to form judgments, is compelled to inquire into or make rules and policy. If standards were more clearly framed the judge would be constrained to operate less frequently beyond the range of judgment-making on to the shibboleth of policy.

Another difficulty with our judicial process is that private persons in private suits assert only their special claims and make no attempt to present or evaluate the social interests involved.¹⁷⁹ It is difficult for the judiciary by limiting consideration to individual interests to formulate or evaluate general policy with any social vision or consistency. In its broadest sense, social policy or interests should not be guided or settled by individual fulmination but by organized and careful group study.

The very bulk and diffusion of case material and the consequent impossibility of scientific and exhaustive preceptual evaluation compel the Bar in its court practice to depend too generally upon specific decisions rather than upon basic principles. This over-emphasis of case law to the detriment of concept-law has imprisoned the American Bar so that only infrequently does it breathe the free air of conceptualism. How common it is for an attorney to parade triumphantly before a court the citation of a very recent decision, originating perhaps in a remote jurisdiction and rendered by "a judge whose opinions derive their weight solely from his official position."¹⁸⁰

The need for conceptual revaluation in various areas of the law is recognized by realists like Judge Frank, although to them the judgment and not the norm is the law. In the *General Time Instrument*

¹⁷⁷ Kocourek, *op. cit.* note 174, at 179.

¹⁷⁸ *Id.* at 186.

¹⁷⁹ Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1381-1382 (1934).

Professor Chafee states that "some experienced advisors consider that the main purpose of appellate argument is to make the judges want to decide your way. It is even said that the citation of authorities is a solemn pretext. My own view is quite different, but here too action is the end desired — a decision for one's client — and not merely the transmission of clear ideas." Chafee, *op. cit.* note 69, at 383.

¹⁸⁰ MOORE, J. B., *THE PASSION FOR UNIFORMITY, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* 316, 331ff. (1924), as quoted by Yntema, *The Jurisprudence of Codification* in DAVID DUDLEY FIELD CENTENARY ESSAYS 255 (1949).

Corporation case, Judge Frank opines that the doctrines relating to trade-names should "be re-evaluated in the light of competent research showing their practical social consequences on consumers, and that, until then, the courts should not extend those doctrines to foster expanded trade-name monopolies."¹⁸¹ Is this not an admission by Judge Frank that normative principles in some legal fields are determinative of judgments and hence constitute the law? It would appear so; yet, this does not repudiate Judge Frank's jural theories, since they are representative of judicial practices for which a universalism has not been claimed. On the contrary, the relativism of Judge Frank reveals a flexibility of thought which is in keeping with the inconstancy of modern society.

THE RESTATEMENT OF THE COMMON LAW

The Restatements of the American Law Institute were aimed at the elimination of certain of the evils of the common law. Their objectives were focused on the reduction of the mass of legal publications which had to be consulted by the Bench and Bar, on the simplification of the common law by a clear, systematic restatement of it and on diminishing the flow of judicial decisions. It was feared that the increasing mass of unorganized judicial decisions threatened to break down the common law system of "expressing and developing law."¹⁸² It was conceived that the Restatements would dispel uncertainty in the law if the law were rewritten with greater clarity and simplicity. This, in Judge Goodrich's opinion, was accomplished as evidenced by the number of actual volumes published, since each subject reflects as nearly as possible currently applicable common law precepts.¹⁸³

The Restatements have departed from the traditionalism of the Anglo-American law for they were formulated as "an authority greater than that now accorded to any legal treatise, an authority more nearly on a par with that accorded the decisions of the courts."¹⁸⁴ To give effect to this objective, the courts should not have gone beyond the statements in the Restatements to cite the cases which formed the basis for their texts. The original texts should have remained the source for the solution of each succeeding controversy. However, traditional procedure was followed so that subsequently judicial decisions which cited the Restatements resulted in the insulation of the public from

¹⁸¹ *Supra*, note 40.

¹⁸² Lewis, *History of the American Law Institute and the First Restatement of the Law*, in *RESTATEMENT IN THE COURTS*, Permanent Edition 1 (1945).

¹⁸³ Goodrich, *The Story of the American Law Institute*, 1951 WASH. L. Q. 283, 290.

¹⁸⁴ *Id.* at 286.

the texts. Thus, those decisions and not the Restatements have become "the authoritative force to be obeyed."¹⁸⁵ By continuing this practice the purpose of the Restatements has been thwarted and the compelling conditions which justified them have been aggravated instead of relieved since the Restatements function only as "an additional source of argument."¹⁸⁶

Mr. Justice Stone foresaw the difficulty that "the mere restatement of law under private auspices would not . . . carry sufficient authority to conquer the over-powering weight of precedent."¹⁸⁷ His early proposal, therefore, was that some method be formulated for reconciling the doctrine of *stare decisis* with this cooperative legal scholarship "which looks beyond the particular case to the law as a whole."¹⁸⁸ He proposed, therefore, that state legislatures be requested to approve the Restatements, not as formal legislative enactments, but as aids and guides to the judiciary so they would be free to follow "the collective scholarships and expert knowledge of our profession . . ."¹⁸⁹

But even this mild compromise with the codification of the common law was rejected by the Institute. Perhaps it was feared that a legislative plan would revive the nineteenth century controversy between the utilitarians and the historical jurists.¹⁹⁰ At any rate, while the objective of the Restatements was the clarification and improvement of the common law that was not to be accomplished by codification. As Judge Goodrich reported, "I submit that our institutional responsibility has been met when we have done our piece of scholarly work, made its existence known and put it into the hands of the bar for consideration. Out of our work and discussion which attends and follows it will come the ideas and growth of opinion from which changes in the law will develop. We could, if we had the means, hasten the process in a particular instance. But in the long run, we could tend to lose some of our authority as a source of disinterested legal scholarship."¹⁹¹

Professor Yntema in 1936 questioned the effectiveness of the Restatements in alleviating the evils of the common law in the absence of legislative sanction.¹⁹² His doubt persisted, as he observed in 1949 that

¹⁸⁵ Franklin, *op. cit.* note 179, at 1376.

¹⁸⁶ ARNOLD, *SYMBOLS OF GOVERNMENT* 51 (1935).

¹⁸⁷ Mason, *Harlan Fiske Stone Assays Social Justice, 1912-1923*, 99 U. OF PENNA. L. REV. 887, 915 (1951).

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Goodrich, *Restatement and Codification*, DAVID DUDLEY FIELD CENTENARY ESSAYS 241 (1949).

¹⁹¹ REPORT OF ADVISOR ON PROFESSIONAL RELATIONS, AMERICAN LAW INSTITUTE, Proceedings, 1943-1944, v. 21, p. 61.

¹⁹² Yntema, *What Should the American Law Institute Do?* 34 MICH. L. REV. 461 (1936).

"the stream of materials to be consulted by the lawyer rolls on in unabated volumes."¹⁹³ In fact, he asked, "... where is the reported case that has lost its formal effect by reason of the Restatement or the case unreported due to its existence?" And he continued, "If there be such, and I have not heard of one, they do not affect the conclusion after a number of years that the Restatement has not relieved the public of the uncertainty and expense attendant upon a system of case-law. Without formal enactment obviating the recourse in ordinary cases to the existing decisions, it could scarcely be otherwise."¹⁹⁴

Another defect of the Restatements is embodied in their exclusively antecedent qualities and in the absence of prospective evaluation. While they represent careful and scholarly historical interpretation of legal precepts, the rules do not show critical evaluation. Nor do they provide for the systematic development and modification of the law since such responsibilities casually and loosely revert under the Institute's program to the courts as in the past. While it is true that these duties were not assumed by the Restatements, the omission of them from the plans of the institute narrowly constricted its operations and seriously limited the measures for the improvement of the administration of justice.¹⁹⁵ Thus, Professor Yntema characterized the Restatements as digests, being merely statements of the law as it is.¹⁹⁶ Since they only report and do not attempt to reform the law their value as media for its improvement is therefore substantially circumscribed.

It is also an error to assume that insular simplification and clarification of language can adequately resolve the difficulties and problems attending the common law. Judge Vanderbilt, in this connection, decries the failure of the Restatements to use consistently a single term to express each "fundamental legal concept."¹⁹⁷ Professor Stone attaches little significance to this defect. As he said, "... our main juristic problems go deeper than consistency of terminology and ... there

¹⁹³ Yntema, *op. cit.* note 180, at 256.

¹⁹⁴ *Ibid.*

¹⁹⁵ Mr. Justice Stone held a broader view than the Institute's as to the function of the Restatements. In an address before the members of the Association of the Bar of the City of New York he said, "It [the Restatement] must state in detail and with precision accepted rules and doctrines, eliminating or modifying the rule or doctrine not supported by reason or adopted to present-day social institutions and needs ... it must avoid the formal statement of the law as a closed system, clearly leaving open for future statements, on the basis of judicial decisions as they are rendered, the rules governing the new and unforeseen situations with which the law must hereafter deal as they arise." As quoted in Mason, *op. cit.* note 187, at 914. Note that Mr. Justice Stone gave exclusive jurisdiction over prospective law to the courts. He omitted any reference to the legislative function in meeting current requirements.

¹⁹⁶ Yntema, *op. cit.* note 180, at 256.

¹⁹⁷ VANDERBILT, MEN AND MEASURES IN THE LAW 34 (1949).

is no particular virtue, either, in our misunderstanding each other in one set of terms rather than in two or three."¹⁹⁸ To effectuate the improvement of the law necessitates the application and utilization of our entire gamut of intellectual resources, social theories and philosophies. This requires that the law be viewed socially, logically, ethically, behavioristically, anthropologically, and so on. Yet Judge Vanderbilt is correct in insisting that language be used precisely and consistently, for in the absence of clear communication little progress can be achieved in formulating plans for the improvement of law through the integrative process.

Notwithstanding the disputed policy considerations of the Institute, the Restatements represent a valuable contribution to the improvement of the law. As Mr. Justice Cardozo observed, "The existence of this Institute is a declaration to the world that *laissez-faire* in law is going or has gone the way of *laissez-faire* in economics."¹⁹⁹ It represents a divergence from the main tradition of Anglo-American law, assuming the historic role of providing transition from the traditional American law to a new scientific jurisprudence.²⁰⁰

The Restatements were described by Professor Williston as dress rehearsals. He said, "It has been the history of law in every other civilized country that after customary or common law has developed to a certain degree, or for a long period of years, and become unwieldy, a code has followed . . . Whether it be in fifty or one hundred or two hundred years, my own belief is that we shall repeat the history of other countries . . . This Restatement . . . will serve as a better foundation for a code, if one should be needed than any country has had before."²⁰¹

Professor Yntema, while observing that the Restatements have failed to remedy the evils of judicial precedents, is nonetheless impressed by the prodigiousness and usefulness of the program. The Restatements are "a necessary prerequisite for effective codification, or in other words scientific improvement of the general private law in technique, form, and substance. Also the skill and experience organized in the American Law Institute is available to implement the grand enterprise."²⁰²

This applies equally as well to the sections of the Torts Restatement which relate to unfair competition. It lays a foundation for the re-examination of the precepts affecting trade practices. While the Restatement only gathers and compiles what has been decided by the

¹⁹⁸ Stone, Julius, *Review of Vanderbilt, Men and Measures in the Law* (1949) in 24 N. Y. U. LAW Q. REV. 638, 640 (1949).

¹⁹⁹ Quoted in Reuschlein, *op. cit.* note 175, at 406.

²⁰⁰ Franklin, *op. cit.* note 179, at 1369.

²⁰¹ Williston, *Written and Unwritten Law*, 17 A.B.A.J. 39, 41 (1931).

²⁰² Yntema, *op. cit.* note 180, at 264.

courts, this preliminary survey of unfair competition will be helpful in revaluating the law.

THE CODIFICATION OF UNFAIR COMPETITION

It has been demonstrated that there is an imperative need for a revaluation of the law of unfair competition. Also, that the judicial process is ill-equipped to perform this function. Further, that the Restatement, while of preliminary assistance in stating what the law is, fails to get to the fundamental conceptual issues of trade practices.

The law of unfair competition requires more than a clarification and simplification of language. The significant trade practices, the economic and social considerations and the basic conceptual policies must be reviewed and reformulated if any meaning is to be given to the regulation of business conduct. This calls for a thorough re-examination and revision of federal and state legislation and the common law rules.

Then, after this study has been made and a new law of unfair competition drafted, it should be submitted for legislative sanction as in the case of the Uniform Commercial Code. This is consistent with the traditions of Anglo-American law. As Judge Goodrich, succinctly explained the practice, ". . . Common law judges and common law lawyers are practical men. If common law rules are adequate and work, they leave them alone. If they do not keep up, resort is had to legislation to supply the defects. The change from one to the other does not involve a discussion of grave philosophical considerations. It is made because it is thought necessary. It is continued so long as it produces desirable results. This has been the method of the Anglo-American law."²⁰³

The writer recommends the preparation and adoption of a new federal and state uniform law of unfair competition. This new act²⁰⁴ would contain the essence of the law of unfair competition with modifications and additions to be supplied by administrative legislation. Obviously, current federal and state legislation affecting trade practices and the Restatement of Torts would be helpful in the formulation of the uniform law.

A range of unfair trade practices has been uncovered by the Federal Trade Commission and the courts which could form the basis for general regulatory prohibition²⁰⁵ and the less effective administrative decisional practice would operate only to enforce the universal

²⁰³ Goodrich, *op. cit.* note 190, at 250.

²⁰⁴ Professor Handler recommends a new uniform act to be applicable at the federal and state levels. Handler, *op. cit.* note 3, at 260. In this, the writer agrees.

²⁰⁵ U. S. FEDERAL TRADE COMMISSION, ANNUAL REPORT 87 (1948).

administrative rules. A practice should be prohibited only if it meets with general business or social disfavor. Then this disapproval should be given universal application and be controlled by forceful sanctions.

As Professor Handler observed, "Unfair competition can not be eliminated until it is defined."²⁰⁶ The pattern of legislative, judicial and administrative experience has been sufficiently outlined to sketch a clear legislative picture of unfair competition but its details must be completed by administrative action. Also, the related social sciences, the philosophies and the other disciplines could contribute much in formulating a consistent policy and in projecting a plan to combat trade abuses. A law of unfair competition, which would provide reasonable protection to both business and the public and yet not be disruptive of American economic and legal practices, should evolve from this integrated program.

²⁰⁶ Handler, *op. cit.* note 3, at 260.